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N. 2914 No. 14549

**United States
Court of Appeals**
for the Ninth Circuit

SPENCER GRANT, Executor of the Last Will
and Testament of BLANCHE KELLEHER
GRANT, Deceased,

Appellant and Appellee,

vs.

JAMES G. SMYTH, Former Collector of Internal
Revenue,

Appellee and Appellant.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JAN 26 1955

PAUL P. O'BRIEN

No. 14549

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In the District Court of the the United States in and
for the Northern District of California, South-
ern Division

No. 31582

SPENCER GRANT, Executor of the Last Will
and Testament of BLANCHE KELLEHER
GRANT, Deceased,

Plaintiff,

vs.

JAMES G. SMYTH, Former Collector of Internal
Revenue,

Defendant.

COMPLAINT FOR RECOVERY OF
FEDERAL ESTATE TAX

To the Honorable, the Judges of the United States
District Court for the Northern District of Cali-
fornia:

Now comes plaintiff, Spencer Grant, as Executor
of the Last Will and Testament of Blanche Kel-
leher Grant, Deceased, and alleges as follows:

I.

This action arises under a statute of the United
States providing for internal revenue, to wit, under
Section 811 of the Internal Revenue Code (U.S.C.,
Title 26, Sec. 811), as hereinafter more fully ap-
pears.

II.

On March 28, 1947, plaintiff was duly appointed
as Executor of the Last Will and Testament of

Blanche Kelleher Grant, Deceased, who was a resident of the City and County of San Francisco, State of California, at the time of her death on March 2, 1947, by an order of the Superior Court of the State of California in and for said City and County of San Francisco duly made and entered in the Matter of the Estate of said decedent and plaintiff at all times since said March 28, 1947, has been and now is duly appointed, qualified and acting as such Executor. Plaintiff is a resident of the Northern District of California, Southern Division.

III.

Defendant at all times between on or about May 26, 1948, and on or about August 8, 1950, was the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Collection District of California. Defendant is a resident of the Northern District of California, Southern Division.

IV.

On or about May 26, 1948, plaintiff duly filed with defendant as such Collector the Federal Estate Tax Return for the estate of said decedent and paid to defendant as such Collector the sum of \$118,-123.25 which was the full amount of tax shown due by said return. Said Section 811 of the Internal Revenue Code provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property includable in his gross estate, and certain annuity

contracts were returned under Item 7 of Schedule E of said estate tax return at the aggregate value of \$160,399.45.

V.

Said annuity contracts, which had been purchased by said decedent in 1938 and 1939 from various insurance companies for the aggregate sum of \$390,000, were single premium non-participating and non-refundable joint and survivor annuity contracts which provided for payment of annuities each year to said decedent and plaintiff during their joint lives and to the survivor of them until the death of such survivor. A list of said annuity contracts, showing the name of the issuing company, the cost of each contract, and the amount of the annuity payable under each contract, is as follows:

Contract No.	Company	Cost	Annuity
A-56921	Connecticut General Life	\$ 50,000.00	\$ 2,629.00
13523	Connecticut Mutual Life	25,000.00	1,314.25
2296-AB2	Metropolitan Life	6,521.46	328.18
2297-AB2	Metropolitan Life	18,478.54	984.54
972085	Pacific Mutual Life	25,000.00	1,428.32
A121202	Sun Life of Canada	50,000.00	2,631.58
AN18809	Aetna Life	38,015.95	1,973.40
AN18810	Aetna Life	11,984.05	657.80
A-21422	Prudential Ins. Co.	25,000.00	1,313.00
A-22937	Prudential Ins. Co.	25,000.00	1,338.25
987534	Pacific Mutual Life	15,000.00	803.23
A122793	Sun Life of Canada	50,000.00	2,679.53
2111175	Travelers Ins. Co.	25,000.00	1,346.72
2109941	Travelers Ins. Co.	25,000.00	1,346.72
Totals		\$390,000.00	\$20,774.52

VI.

At the time of said decedent's death, plaintiff was 67 years, 2 months and 2 days old and his life expectancy as the surviving annuitant under said annuity contracts was 9.96 years under the Actuaries' or Combined Experience Table of Mortality. Said aggregate value of \$160,399.45 was computed in accordance with plaintiff's life expectancy of 9.96 years and the value of said contracts at the time of said decedent's death was not greater than said sum of \$160,399.45.

VII.

On or about July 18, 1950, plaintiff was notified by the Bureau of Internal Revenue of a proposed deficiency assessment of estate tax with respect to said return in the aggregate amount of \$29,235.79. Said proposed deficiency in tax resulted principally from adjustment of the aggregate value of said annuity contracts by increasing such value from the returned amount of \$160,399.45 to the adjusted amount of \$257,117.20. The portion of the proposed deficiency in tax attributable to such adjustment in value was the sum of \$28,356.41.

VIII.

On or about August 8, 1950, plaintiff paid to defendant as such Collector the full amount of said proposed deficiency of \$29,235.79. Such payment, to the extent of said sum of \$28,356.41, was erroneously and illegally assessed against and collected from plaintiff and payment thereof by plaintiff was

made by him without prejudice to his right to demand refund thereof.

IX.

On or about November 26, 1951, plaintiff duly filed with the Commissioner of Internal Revenue his amended claim for refund of said sum of \$28,356.41 and of such additional amount of estate tax to which he will be entitled when the deductible amount of his attorney's fees and disbursements incurred and to be incurred by him in seeking refund of said sum has been established, together with interest on such refund as provided by law. Plaintiff set forth in said amended claim for refund as grounds for recovery thereof that said annuity contracts were not includable in the gross estate of said decedent under said Section 811 of the Internal Revenue Code or at all but that, if they were so includable, the basis of their valuation for purposes of said deficiency assessment was arbitrary, unreasonable and contrary to law and erroneously attributed to them a value far in excess of their fair value at the time of decedent's death.

X.

More than six (6) months have expired from and after the date of filing of said amended refund claim without the rendition of any decision thereon by the Commissioner of Internal Revenue within that time.

XI.

Said sum of \$28,356.41 was erroneously and illegally assessed against and collected from plaintiff for the reasons set forth in said amended claim for

refund, and a full, true and correct copy of said amended claim is attached hereto as an exhibit and by this reference incorporated herein and made a part hereof.

XII.

By reason of the matters hereinbefore alleged, defendant became indebted to plaintiff in said sum of \$28,356.41 and in such additional sum to which plaintiff will be entitled when the deductible amount of his said attorney's fees and disbursements has been established. Neither the whole nor any part of said sum of \$28,356.41 or of said additional sum has been paid or credited to plaintiff and the whole thereof remains due, owing and unpaid to plaintiff.

Wherefore, plaintiff prays for judgment against defendant as follows:

(1) For the sum of \$28,356.41, with interest thereon at the rate of 6% per annum from August 8, 1950;

(2) For such additional sum to which plaintiff will be entitled when the deductible amount of his said attorney's fees and disbursements has been established;

(3) For his costs of suit; and

(4) For such other and further relief as may be proper in the premises.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff.

DEMAND FOR JURY TRIAL

By this endorsement hereon and pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a trial by jury of all issues so triable in the above-entitled action.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff.

Form 843

U. S. Treasury Department

Internal Revenue Service

AMENDED CLAIM

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp: [Blank.]

Name of taxpayer or purchaser of stamps:

Spencer Grant, as Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased.

Business address:

c/o Slack & Zook, 310 Sansome St., San Francisco 4, Calif.

Residence:

1810 Jackson Street, San Francisco, California.

1. District in which return (if any) was filed: 1st California, San Francisco.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from, 19.., to, 19...
3. Character of assessment or tax: Estate tax.
4. Amount of assessment: \$28,356.41. Dates of payment: August 8, 1950.
5. Date stamps were purchased from the Government:.....
6. Amount to be refunded (plus interest): \$28,356.41*.
7. Amount to be abated (not applicable to income, estate, or gift taxes):

*In addition to said sum of \$28,356.41, claimant also requests refund of the amount of estate tax to which he will be entitled when the deductible amount of attorney's fees and disbursements incurred and to be incurred by him in connection with refund of said sum has been established.

The claimant believes that this claim should be allowed for the following reasons:

This amended claim is for refund of estate tax overpaid with respect to certain joint and survivorship annuity contracts included in the gross estate. The grounds for the claim are as follows:

(1) The annuity contracts are not includable in the gross estate.

(2) Even assuming for purposes of argument that the contracts comprised a part of the gross estate, they were erroneously valued at amounts greatly in excess of their fair value.

These grounds are discussed in more detail in the attached statement.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ SPENCER GRANT,
Executor.

Dated November 23rd, 1951.

GROUNDS FOR REFUND CLAIM

Statement of Facts

On May 26, 1948, the Federal Estate Tax Return (Form 706) for the Estate of Blanche Kelleher Grant, Deceased, was duly filed with the Collector of Internal Revenue at San Francisco, California, and the full amount of tax shown due by the return in the sum of \$118,123.25 was paid by claimant, as executor, to such Collector. Claimant has at all times since the filing of said return been and now is the duly appointed, qualified and acting executor for said estate.

The joint and survivorship annuity contracts comprising Item 7 of Schedule E of the return were returned at the aggregate value of \$160,399.45, which was computed in accordance with Table A of Regulations 105. A list of said annuity contracts and a statement of the basis of computation of their returned value was annexed to such Schedule and full, true and correct copies of such list and statement are attached hereto as Exhibit A.

By letter, dated July 18, 1950, with symbols "IT-EG-22144-1st Calif., Estate of Blanche Kelleher Grant," and addressed to claimant by the Internal Revenue Agent in Charge, San Francisco Division, claimant was notified of a proposed deficiency assessment of estate tax in the aggregate amount of \$29,235.79 computed in accordance with the "report of examination" of which a copy was enclosed with said letter. The proposed deficiency in tax resulted

principally from adjustment of the value of said annuity contracts by increasing such value from the returned amount of \$160,399.45 to the adjusted amount of \$257,117.20. The portion of the proposed deficiency in tax attributable to such adjustment was \$28,356.41. The balance of the proposed deficiency resulted from other adjustments not here material and which claimant does not question.

At the time the return was filed and the tax shown due thereon was paid on May 26, 1948, the sum of \$28,000 was deposited by claimant with said Collector to be held as a special deposit to cover any additional estate tax that might thereafter be determined to be due from the estate. On August 7, 1950, the further sum of \$1,397.68 was paid by claimant to said Collector to be added to said special deposit. Said further sum represented \$1,235.79 on account of the principal amount of the proposed deficiency and \$161.89 as interest on said sum of \$1,235.79 at the statutory rate from June 2, 1948 (15 months after Mrs. Grant's death), to August 8, 1950.

By letter, dated August 17, 1950, and addressed to the Internal Revenue Agent in Charge, San Francisco Division, on claimant's behalf, the Agent in Charge was notified that claimant consented to the immediate assessment of the entire amount of said proposed deficiency in order that claimant might be placed in position to file a claim for refund; and by letter, dated August 18, 1950, and addressed to said Collector on claimant's behalf, the Collector was

authorized immediately to assess said deficiency and to apply said special deposit forthwith in payment thereof. Said special deposit already had been so applied on August 8, 1950, and the full amount of said deficiency consequently already had been paid by claimant to said Collector on said date. Of the amount of such payment, said sum of \$28,356.41 was erroneously and illegally assessed against and collected from claimant and payment thereof was made by claimant without prejudice to his right to demand refund thereof.

Said annuity contracts were purchased by Mrs. Grant in 1938 and 1939 from various insurance companies for a total consideration of \$400,000. They were non-participating, non-refundable joint and survivorship annuity contracts for payment of stipulated annuities aggregating \$20,774.52 per year to Mrs. Grant and claimant during their joint lives and, on the death of either, to the survivor of them for his or her life. No reversionary interest was retained by Mrs. Grant under the contracts, either expressly or otherwise.

Mrs. Grant died on March 2, 1947. On that date, claimant, who was born January 1, 1880, was 67 years and two months old. Under the Actuaries' or Combined Experience Table of Mortality, the life expectancy for claimant on March 2, 1947, as the surviving annuitant under said annuity contracts was 9.96 years. The value of said annuity contracts, i.e., the value of the total annuity payments receivable by claimant under said contracts during his life expectancy, was not more than the sum of \$160.-

399.45 at which the annuity contracts were valued in the return.

Claimant is informed and believes that the adjusted value of \$257,117.20 in said "report of examination" was based on the aggregate costs which would have been charged by the same insurance companies on March 2, 1947, for annuity contracts calling for payment to claimant of annuities equal in amount to those payable under the contracts in question. The basis of computation of such costs differs substantially and materially from the basis used when the contracts in question were issued in 1938 and 1939 in that the original costs were all computed on the basis of an assumed interest rate of 3% whereas the March, 1947, costs were all computed on the basis of an assumed rate of 2% except for a 2¼% rate used in the case of Metropolitan Life Insurance Company. Moreover, said Company used an age setback of 3 years in 1947 but only 1 year in 1938 and Pacific Mutual Life Insurance Company used a different mortality table in 1947 than the one used for its contract No. 972085 in 1937.

Taking into account the fact that the portion of each annuity payment to claimant equal to 3% of the original cost paid by Mrs. Grant is taxed to claimant as income under Section 22(b)(2)A of the Internal Revenue Code, claimant would have to live to the age of 96 years—or three times longer than his expectancy—before recovering a return of the

full amount of the adjusted capital valuation of \$257,117.50.

Basis of Refund Claim

This refund claim is based on the following separate grounds:

(1) The annuity contracts are not includable in the gross estate.

(2) The "comparable contract" method of valuation used in arriving at the adjusted valuation of the annuity contracts erroneously attributed to them a value far in excess of their actual value and was arbitrary, unreasonable and contrary to law.

The annuity contracts are not includable in the gross estate.

The annuity contracts were purchased by Mrs. Grant in 1938 and 1939 and she died in 1947. She retained no reversionary interest under the contracts, either by their express terms or otherwise. If the contracts were includable in her gross estate, it was because they constituted a transfer "intended to take effect in possession or enjoyment at or after death" within the meaning of Section 811(c) of the Internal Revenue Code. However, Section 811(c) was amended by Section 7 of the Technical Changes Act of 1949 to provide that such a transfer is not includable in gross estate in the case of property transferred prior to October 7, 1949, by a decedent dying after February 10, 1939, unless the decedent

retained a reversionary interest by the express terms of the instrument of transfer. This amendment was given retroactive effect by its terms. Accordingly, under the authorities construing the Technical Changes Act as applied to similar cases, the annuity contracts in this case did not comprise any part of Mrs. Grant's estate and the entire amount of additional tax assessed with respect to them was erroneously and illegally assessed. See:

Commissioner v. Wilder's Estate,
118 F. 2d 281;

Pruyn's Estate v. Commissioner,
184 F. 2d 971;

Estate of Twogood,
15 T.C., No. 129.

Even assuming that the annuity contracts are includable in the gross estate, the adjusted valuation placed on them was far in excess of their actual value.

The "comparable contract" method of valuing the annuity contracts resulted in an adjusted valuation of \$257,117.20. This valuation cannot be sustained because (a) it is based on an irrelevant measure of value, (b) it fails to take into account all relevant factors and elements of value, and (c) it exceeds the fair value of the contracts by at least \$96,717.75.

(a) The "comparable contract" measure of value is an irrelevant measure in this case.

This is so because contracts issued on March 2, 1947, the date of Mrs. Grant's death, are not comparable to the Grant contracts which were issued in 1938 and 1939. The 1947 contracts are not comparable for two reasons: First, a different basis of computing premiums was used by the insurance companies in 1947 which increased the relative cost or value of the 1947 contracts, and, second, a much greater portion of the annuity payments under the 1947 contracts would constitute tax-free return of capital, thereby also increasing their relative value.

Increased cost of 1947 contracts.

The premiums for the Grant contracts were computed on an assumed 3% interest basis and the premiums for the so-called "comparable contracts" are computed on an assumed 2% interest basis ($2\frac{1}{4}\%$ in one instance). The cost of a contract computed on a 2% basis is much greater than if computed on a 3% basis and this cost differential is amplified by the loading charge of $6\frac{1}{2}\%$ applicable to the gross cost or premium (differences in setback figures and actuarial tables in the cases of two of the contracts further preclude a comparison in those instances). The foregoing proposition is forcefully illustrated by the fact that if the premiums for contracts issued in 1947 had been based on the same factors used in computing the original consideration for the Grant contracts, the 1947 or so-called "comparable contracts" actually would have cost \$21,333.36 less than the adjusted value erroneously placed on them by the Bureau in this case. This

renders the cost of the so-called "comparable contracts" entirely irrelevant as a measure of value for the simple reason that such contracts are not comparable.

It was held in *Edwards v. Commissioner*, 46 B.T.A. 815, that a reduction in the assumed interest rate for purposes of computing annuity contract premiums is a factor which differentiates allegedly comparable contracts "unmistakably" from previously issued contracts. This decision was affirmed (135 F. 2d 574) and the appellate court said:

"Subsequent to their issuance and prior to the (valuation date), the basis of insurance annuity contracts had been so modified that it was possible to secure them only at a greater cost.
* * * The value could not be established by consideration of comparable contracts for the simple reason that no comparable contract was procurable." (Our emphasis.)

The different interest rate used in computing the costs of 1947 contracts also means that the amounts of the calculated principal and interest elements making up each payment under the 1947 contracts differ from those under the Grant contracts. A package, the price of which is computed on the basis that it will contain "X" dollars of principal and "Y" dollars of interest, is not comparable to one the price of which is computed on the assumption it will contain "A" dollars of principal and "B" dollars of interest, especially when only \$5 is charged for the first package and \$8 is charged for

the other. In the case of annuity contracts, the different interest factor used in computing costs also results in a difference in the amount of the reserves set up by the companies and in the amounts of the declining balances thereof as payments are made to the annuitant.

Increased return of capital under 1947 contracts.

There is another essential difference between the Grant annuity contracts and the so-called "comparable contracts." By reason of Section 22(b)(2)A of the Internal Revenue Code, \$12,000 of the annual payments under the Grant contracts is taxable income to claimant each year whereas only about \$6,700 would be taxable income to him each year under the so-called "comparable contracts." In other words, his tax free return of capital would be about \$5,300 greater each year under the so-called "comparable contracts" even though the amount of the annuity payments would be identical in both cases. A contract for a \$20,000 annuity which entitles the annuitant to keep, for example, \$14,000 as tax-free return of capital obviously is not comparable to another contract under which he may keep only \$8,000. The value of the former bears no relation to the value of the latter. The value of the former is, of course, much greater.

- (b) The "comparable contract" measure of value fails to take into account all relevant factors and elements of value.

It takes no account whatsoever, for example, of the fact that under Section 22(b)(2)A of the In-

ternal Revenue Code more than half, or \$12,000, of the annuity payments to claimant must be included in his taxable income so that he would have to live three times longer than his actuarial expectancy before he would recover the full amount of the adjusted capital valuation determined by the Bureau. This has a vital bearing on the value of the annuity contracts because the fair market value of the right to receive an annual capital payment of \$20,000 no part of which will be taxable income to the recipient is obviously greater than the value of his right to receive the same amount annually if \$12,000 thereof will be taxable income each year. The difference between the market value of a payment which is tax free to the recipient and the market value of a payment of the same amount which is taxable income to the recipient is clearly illustrated by the fact that a tax-exempt government or municipal bond fetches a much higher market price than a high grade corporate bond bearing the same rate of interest and with the same maturity value and date. The corporate bond invariably has a lower market value.

Stated differently, claimant's right to receive "X" dollars of capital payable in 29 annual installments if he lives that long is not worth "X" dollars, even discounted, to him or anyone else if the only available evidence shows that he has an expectancy of not more than 10 years. The result of the "comparable contract" method in this case is to treat as corpus or capital for estate tax purposes an amount

which will also be treated as taxable income, and this is contrary to law. See *Bull v. United States*, 295 U. S. 247.

- (c) The valuation obtained by use of the "comparable contract" method exceeds the actual fair value of the contracts by at least \$96,717.75.

This sum represents the difference between the adjusted value and the returned value. It is a minimum sum and there is substantial evidence that in fact the fair value of the contracts was substantially less even than the returned value.

In the first place, under Section 81.10(i)(3) of Regulation 105, joint and survivorship annuity contracts issued by any party other than an insurance company are to be valued by using Table A and discounting the payments at 4%. This means that if the joint and survivorship contracts in this case had been issued by a charitable institution, for example, they would have been valued at the lower returned value of \$160,399.45 and not at the adjusted value of \$257,117.20. Also, Mrs. Grant might have bequeathed property to a charitable institution subject to the payment of identical annuities to claimant and they would have been valued at the lower returned value. Lacking any evidence of difference in ability to continue to make future payments, how can the present value of the right to receive \$1.00 from an insurance company in 1952 be far greater than the present value of the right to receive \$1.00 in 1952 from Harvard University or the Carnegie Foundation? It cannot be, of course. It follows, then, that if the

right to receive an annuity payment of \$1.00 from any party other than an insurance company is presently worth only 75c, say, this is cogent evidence that the right to the same payment from an insurance company is no more valuable and that the Regulation to the contrary is patently capricious, arbitrary and unreasonable and cannot be sustained.

Further evidence of the capricious character of Regulation 81.10(i) also appears from the fact that an ordinary life estate, as distinguished from an annuity, is valued under the same Regulation by means of Table A. Claimant does not understand why a survivor's right to receive annuity payments of \$1,000 for his life under a joint and survivorship annuity contract issued by Blank Insurance Company has far greater value than his right as a life tenant to receive \$1,000 payable annually for his life from Trustee Bank. If Table A and life expectancy would be the measure of value for claimant as life tenant, how can \$1,000 possibly have greater value when paid to him as annuitant by an insurance company instead of by a trustee bank?

In the second place, even the returned value would not be recovered by claimant during his 10-year life expectancy. Claimant has already pointed out that taking into account the fact that \$12,000 of the annual payments under the contracts must be treated as taxable income to him, he would have to live three times longer than his expectancy for full recovery of the adjusted capital value. This same factor is present in the case of the returned value

because claimant would not recover even the full returned value tax free until the expiration of 18 years or a period almost twice as long as his 10-year life expectancy.

Clearly, any capital value placed on the annuity contracts which would not be recovered tax-free by claimant during his life expectancy would be excessive to that extent. It is fair to say, therefore, that any value greater than any \$87,774 would be excessive. This sum of \$87,774 represents the aggregate amounts of the annuity payments to claimant during a 10-year period which will not be subjected to income tax in his hands. No capital value should be attached to the \$12,000 per year income or interest element. A promissory note for \$87,774 payable in 10 annual installments of \$8,774 with interest at the rate of \$12,000 per annum would be valued at \$87,774 under Section 81.10(e) of Regulation 105. If no interest were payable, the same note would be valued at only its commuted value.

The government cannot possibly lose under the returned value because Grant would have to live 8 years longer than, or almost twice as long as, his expectancy for a full return of capital and, if he outlived his expectancy by more than 8 years, all further payments would be subject to income tax in their entirety.

The problem is simply one of valuation of what is, for all practical purposes, a life interest and there is no justification for isolating any single evidentiary factor and discarding all others or in ap-

plying to an annuity issued by an insurance company a different measure of value than is applied to an annuity issued by anyone else or to an ordinary life estate. On the contrary, as Section 81.10(a) of Regulations 105 itself provides, "all relevant facts and elements of value * * * should be considered in every case."

The vice of Section 81.10(i) is twofold: First, it applies an irrelevant measure of value where, as here, comparable contracts are not procurable and, second, it excludes from any consideration all relevant facts and elements of value. The latter vice is apparent from the following statement of the basic issue: What was the fair value on March 2, 1947, of claimant's contractual right to receive the annuity payments for his life, taking into account (1) the fact that his life expectancy was 9.96 years and (2) the fact that each payment is composed of both principal and interest and that, as regards the interest element, an income tax is imposed by law on the portion of each payment equal to 3% of the original cost or, in this case, on \$12,000 or more than half of the amount of the aggregate annual payments? Claimant is convinced that the inequitable whipsaw effect of Section 81.10(i)(2) of Regulations 105 viewed in the light of Section 22(b)(2)A of the Internal Revenue Code would be apparent to any court or jury passing on the valuation issue and claimant proposes, if necessary, to submit the issue to a jury. The unconscionable and unrealistic effect of Section 81.10(i)(2) of the Regulations in this case is too palpable to go unchallenged.

Attorney's Fees

Claimant necessarily has incurred attorney's fees in the preparation of this refund claim and necessarily will incur further attorney's fees and legal disbursements in connection with trial and perhaps appellate court proceedings if this claim is disallowed. The amount of such fees and disbursements is not presently ascertainable and cannot now be established. Claimant at this time claims refund of the additional amount of estate tax to which he will be entitled when the amount of such fees and disbursements has been established. Such amount will constitute a proper deduction from the gross estate (Section 81.34, Regs. 105).

Conclusion

The annuity contracts are not includable in the gross estate under Section 811(c) as amended by the Technical Changes Act of 1949. Even assuming solely for argument that they comprise part of the gross estate, nevertheless their fair value was not greater than the amount at which they were returned. Claimant therefore is entitled to refund of the sum of \$28,356.41 or such greater sum to which he may be entitled on account of the erroneous and illegal assessment with respect to said annuity contracts, as well as such further sum as may be ascertained when his attorney's fees and disbursements are established, together with interest as provided by law.

SPENCER GRANT,

Executor of the Last Will and Testament of
Blanche Kelleher Grant, Deceased.

Attorney's Statement

The undersigned, Edgar T. Zook, 310 Sansome Street, San Francisco, California, prepared the within refund claim on the basis of oral and written information imparted to him by claimant and by the insurance companies therein referred to and on the basis of information obtained from claimant's books of account and records and on the basis of information contained in the files of the undersigned. While the undersigned does not know of his own knowledge whether the statements of fact contained in said refund claim, to the extent that such statements are based on information imparted by claimant or said insurance companies, are true, the undersigned believes them to be true.

Dated: November 26, 1951.

EDGAR T. ZOOK,
Attorney for Claimant.

EXHIBIT A

Estate of Blanche K. Grant
(Schedule E, Item 7)

Valuation of joint and survivor annuities under Table A of Regulations 105, Spencer Grant, surviving annuitant having been born on January 1, 1880, and being 67 years of age on March 2, 1947, the date of decedent's death.

Number of Policy	Company	Annuity Date	Amount of Annuity	Value per	
				Dollar of Annuity	Policy
56921	Connecticut General Life	Mar. 28	\$2,629.00	\$8.14979	\$ 21,425.80
13523	Connecticut Mutual Life	Apr. 1	1,314.25	8.13635	10,693.20
2296	Metropolitan Life	Apr. 1	328.18	8.13635	2,670.19
2297	Metropolitan Life	Apr. 1	984.54	8.13635	8,010.57
972085	Pacific Mutual Life	July 1	1,428.32	7.88366	11,260.39
A121202	Sun Life of Canada	July 1	2,631.58	7.88366	20,746.48
AN18809	Aetna Life	Oct. 1	1,973.40	7.63366	15,064.26
AN18810	Aetna Life	Oct. 1	657.80	7.63366	5,021.42
A21422	Provident Life	Oct. 1	1,313.00	7.63366	10,023.00
A22937	Provident Life	Dec. 31	1,338.25	7.38366	9,881.18
987534	Pacific Mutual Life	Dec. 31	803.23	7.38366	5,930.78
A172793	Sun Life of Canada	Dec. 31		7.38366	19,784.74
2111175	Travelers Insurance Co.	Dec. 31	1,346.72	7.38366	9,943.72
2109941	Travelers Insurance Co.	Dec. 31	1,346.72	7.38366	9,943.72

Total value\$160,399.45

Note: For basis of valuations of annuities, see annexed letter from Coates and Herfurth, independent actuaries, San Francisco, California.

Grant Estate

Present Value of Annual Payments of \$1.00 for Life Age 67. Combined Experience Table and 4% Interest.

Date of First Payment	Value as of March 2, 1947
March 28, 1947.....	\$8.14979
April 1, 1947.....	8.13635
July 1, 1947.....	7.88366
October 1, 1947.....	7.63366
December 31, 1947.....	7.38366
March 2, 1948.....	7.21699

“Present Value” may be defined as the sum of money which, if deposited in a bank, would be just sufficient to provide annual payments for life, provided that interest is credited each year on the balance of the account at the rate shown, and provided that mortality is in accordance with the Table of Mortality used.

I certify that the above figures are the present values as of March 2, 1947, of an annual payment of \$1.00 for the lifetime of a person aged 67, the first payment being made on the date indicated, based on interest at 4% per annum and the Combined Experience Table of Mortality. I also certify that, according to the Combined Experience Table of Mortality, the Expectation of Life for a person aged 67 is 9.96 years.

COATES and HERFURTH,
Consulting Actuaries.

By /s/ G. FRANK WAITES.

San Francisco, California, May 10, 1948.

[Endorsed]: Filed June 2, 1952.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER TO PLAINTIFF'S
COMPLAINT

Now comes the defendant, James G. Smyth, former Collector of Internal Revenue, by Chauncey Tramutolo, United States Attorney for the Northern District of California, his attorney, and for answer to the complaint filed by the plaintiff herein, denies each and every allegation contained in the said complaint that hereinafter in this answer is not admitted, qualified or denied, and for further answer to the plaintiff's complaint, the defendant says:

I.

The allegations of paragraph numbered I of the plaintiff's complaint are admitted.

II.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph numbered II of the complaint.

III.

The allegations of paragraph numbered III of the complaint are admitted.

IV.

The defendant says that the allegations of paragraph numbered IV of the complaint are matters of law, except that the defendant admits that on or about May 26, 1948, the plaintiff filed with the defendant as Collector a federal estate tax return for the estate of the decedent and paid to the defendant

as Collector the sum of \$118,123.25, which was the full amount of tax reported due in said return, and the defendant admits that certain annuity contracts were returned under Item 7 of Schedule E of the estate tax return at the aggregate value of \$160,399.45.

V.

The allegations of paragraph numbered 5 of the complaint are denied, except that the defendant admits that the annuity contracts, which had been purchased by the decedent in 1938 and 1939 from various insurance companies, were single premium non-participating and non-refundable joint and survivor annuity contracts, and the defendant admits that the names of the insurance companies issuing the annuity contracts and the numbers of the annuity contracts appear in the list of such companies and contract numbers in paragraph numbered V of the complaint, and the defendant admits that the amounts of the annuities under the contracts are as appearing in the column headed "Annuity" in paragraph numbered V of the complaint.

VI.

Answering paragraph numbered VI of the complaint, the defendant admits that at the time of the decedent's death the plaintiff was 67 years, 2 months and 2 days old; denies that the value of the annuity contracts at the time of the decedent's death was not greater than the sum of \$160,399.45, and says that the other allegations contained in paragraph numbered VI of the complaint relate to matters about which the defendant is without knowledge or information

sufficient to form a belief as to the truth of the averments.

VII.

The allegations of paragraph numbered VII of the complaint are admitted, except that the defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that "The portion of the proposed deficiency in tax attributable to such adjustment in value was the sum of \$28,356.41."

VIII.

The allegations of paragraph numbered VIII of the complaint are denied. Further answering paragraph numbered VIII, the defendant says that the deficiency assessment of estate taxes in the amount of \$29,235.79 was paid by a payment in the sum of \$1,235.79, plus \$161.89 interest, on August 8, 1950, and that the balance of \$28,000, which had been deposited with the defendant on May 26 1952, with instructions to hold until the matter of a possible deficiency in taxes was settled, was credited on November 1, 1950. The defendant admits that the payment of the deficiency by the plaintiff was made by him without prejudice to his right to demand refund thereof.

IX.

The allegations of paragraph numbered IX of the complaint are denied, except that the defendant admits that on or about November 26, 1951, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund in the sum of \$28,356.41.

X.

The allegations of paragraph numbered X of the complaint are admitted.

XI.

The allegations of paragraph numbered XI of the complaint are denied.

XII.

The allegations of paragraph numbered XII of the complaint are denied, except that the defendant admits that neither the whole nor any part of the sum of \$28,356.41, or of any additional sum, has been paid or credited to the plaintiff. Further answering paragraph numbered XII of the complaint, the defendant says that the plaintiff has not overpaid estate taxes and that neither the whole nor any part of the amount of estate taxes paid by the plaintiff are due and owing to the plaintiff, and that the plaintiff is not entitled to a refund in any amount of the estate taxes paid.

Wherefore, the defendant asks that the plaintiff's complaint and alleged cause of action be dismissed, and that costs herein be assessed against the plaintiff.

Dated: November 3, 1952.

/s/ CHAUNCEY TRAMUTOLO,

United States Attorney;

/s/ CHARLES E. COLLETT,

Assistant United States Attorney, Attorneys for Defendant.

[Endorsed]: Filed November 4, 1952.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated, admitted and agreed by both parties hereto that the following facts are true and may be considered by the Court in reaching its decision herein, subject to the right of either party to offer in evidence other facts not inconsistent therewith:

1. Prior to 1938 and at all times thereafter until March 2, 1947, plaintiff and Blanche Kelleher Grant were husband and wife.

2. Plaintiff was born on January 1, 1880, and Mrs. Grant was born on January 26, 1881.

3. Mrs. Grant died on March 2, 1947, a resident of the City and County of San Francisco, State of California. On March 28, 1947, plaintiff was duly appointed and qualified as the executor for her estate and he at all times since March 28, 1947, has been and now is duly appointed, qualified and acting as such executor.

4. On or about May 26, 1948, plaintiff filed with defendant, as the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Collection District of California, the Federal Estate Tax Return for Mrs. Grant's estate and paid to defendant as such Collector the sum of \$118,-123.25, which was the full amount of tax shown due by the return. Certain annuity contracts (hereinafter called the "Grant annuity contracts"), pur-

chased by Mrs. Grant prior to her death were returned under Item 7 of Schedule E of said return at the aggregate value of \$160,399.45 as of March 2, 1947, the date of Mrs. Grant's death.

5. On March 2, 1947, plaintiff was 67 years, 2 months and 2 days old and his remaining life expectancy was 9.96 years under the Actuaries' or Combined Experience Table of Mortality.

6. On or about July 18, 1950, plaintiff was notified by the Bureau of Internal Revenue of a proposed deficiency assessment of estate tax in the aggregate amount of \$29,235.79 with respect to said estate tax return. The proposed deficiency resulted principally but not entirely from adjustment of the aggregate value of the Grant annuity contracts by increasing such value from the returned value of \$160,399.45 to the adjusted value of \$257,117.20.

7. Said proposed deficiency assessment of \$29,235.79, with interest thereon in the sum of \$161.89, was paid by plaintiff to defendant as Collector on September 22, 1950.

8. On or about November 27, 1951, plaintiff filed with the Collector of Internal Revenue his amended claim for refund of the sum of \$28,356.41 and for refund of such additional amount of estate tax to which he will be entitled when the deductible amount of his attorneys' fees and disbursements incurred and to be incurred by him in seeking refund of said sum has been established. A full, true and correct

copy of said amended claim for refund is attached as an exhibit to the complaint on file herein.

It is hereby further stipulated and agreed by both parties hereto that a photostatic copy of the Federal Estate Tax Return filed for Mrs. Grant's estate, a photostatic copy of the Revenue Agent's report proposing a deficiency in estate tax, and photostatic copies of the Grant annuity contracts may be introduced in evidence as joint exhibits without offering the originals and without further proof of the authenticity thereof.

Dated: January 21, 1954.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for Defendant.

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

STIPULATION WAIVING JURY

It is hereby stipulated and agreed by and between the respective parties through their respective counsel that a jury is waived in the above-entitled cause and that the action may be tried by the Court sitting without a jury.

Dated: March 1, 1954.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for Defendant.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

OPINION

Hamlin, District Judge.

This is an action by plaintiff, as executor of his wife's will, to recover an alleged overpayment of estate tax. The facts are not in dispute and were stipulated at the trial.

Mrs. Grant purchased fourteen annuities in 1938 and 1939 aggregating in cost \$390,000.00. The insurance companies agreed to pay to Mr. and Mrs. Grant jointly, during Mrs. Grant's lifetime, \$20,744.52 per year. After the death of Mrs. Grant, Mr. Grant if he survived was to receive the same amount per year for the remainder of his life. These contracts were "single premium non-participating and non-refundable joint and survivorship annuity contracts." At the time of the purchase Mrs. Grant was about 58 years of age and Mr. Grant was about 59.

Mrs. Grant died on March 2, 1947, at the age of 67, leaving Mr. Grant surviving her. An estate tax return was filed which included these annuities in the gross estate of Mrs. Grant and valued them at \$160,399.45. This was based on a table of mortality basis as provided in the Treasury Regulations when there are no comparable contracts for purposes of valuation. The government took the position that there were comparable contracts and revalued the annuities at \$257,117.20. The Commissioner assessed a deficiency tax in the amount of \$29,235.79. This was paid, together with interest in the amount of \$161.89, by the estate on September 22, 1950. This action for refund was filed on June 2, 1952.

Plaintiff makes two contentions: First, that the annuities were not includable in the gross estate at all; and Second, that if they were includable, the Commissioner's basis for valuation was wrong. If plaintiff should prevail in its first contention, he

should recover \$29,397.68. The full tax paid cannot be recovered due to the statute of limitations.

If the annuities are to be included in the gross estate, there are three possible valuations that may be used.

If a survivorship contract purchased just prior to Mrs. Grant's death which would pay Mr. Grant \$20,744.52 for his lifetime is a comparable contract, it is stipulated that the valuation of such a contract would be \$60,980.72, and plaintiff should recover \$29,397.68.

If a single life contract purchased by Mr. Grant at or after Mrs. Grant's death which would pay him \$20,744.52 per year for his lifetime, is a comparable contract, it is stipulated that the valuation to be used is \$257,117.20, and plaintiff should recover nothing. (This is the valuation used by the Commissioner.)

If there are no comparable contracts, it is stipulated that they should be valued on an actuarial valuation which is stipulated to be \$160,399.00, and plaintiff should recover \$28,603.43. (This is the valuation used in the estate tax return.)

Includability

At the time of Mrs. Grant's death in 1947, there was no question but that these annuities were includable in her gross estate. 26 U.S.C.A. §811(c) expressly required their inclusion. The plaintiff contends that the Technical Changes Act of 1949 (63

Stat. 891) at Section 7 retroactively changed this.¹ In short, plaintiff contends that this was a transfer “intended to take effect in possession or enjoyment at or after his death” and since the transfer was made prior to October 7, 1949, it is not includable in the gross estate. Plaintiff’s contention is that Mrs. Grant retained no possession or enjoyment in the property and did not have the right to the income from it and therefore it is not includable under Section 811(c) (1) (B).

It is true that under the annuity contracts Mrs. Grant parted with all control over the money transferred. It was not kept in any separate fund, but was commingled with the insurance companies’ general funds. The companies were bound to pay the

¹26 U.S.C.A. §811(c) as amended by §7(a) of the Technical Changes Act of 1949 provides in part:

“Sec. 811. Gross Estate. The value of the gross estate shall be determined by including the value at the time of death of all property * * *.

“(c) (1) General Rule. To the extent of any interest therein of which the decedent has at any time made a transfer * * * by trust or otherwise—

* * *

“(B) under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property * * *; or

“(C) intended to take effect in possession or enjoyment at or after his death.”

Section 811(C) (2) exempts from the gross estate transfers taxed under (C) just above, where no reversionary interest is retained (concededly no such interest was retained by Mrs. Grant) and the transfer was made prior to October 7, 1949.

annuity whether they lost the particular money paid to them or not. Mrs. Grant had no control over the investment of any of the insurance companies' funds. If Mr. and Mrs. Grant had died the day after the last annuity was purchased they would have received nothing. The increased or decreased earning power of money did not affect the sum to which the Grants were entitled.

Were this question presented to the Court for the first time with no prior authority the Court would be inclined to believe that there was considerable merit in plaintiff's contention that this was a transfer intended to take effect in possession or enjoyment after death and not a transfer wherein grantor retained for life any possession or enjoyment thereof or the right to the income therefrom. However, the Ninth Circuit has held, and this is binding on this Court, that such a transfer is includable in the gross estate.² The plaintiff has attempted to distinguish this case and other similar cases³ on the grounds that when they were decided the courts did not have to make a distinction between a retained life interest and an interest to take effect at or after death since both were always includable. However, the language of the Court in the

²Commissioner v. Clise, 9th Cir., 1941, 122 F. 2d 998, cert. den., 315 U.S. 821.

³Mearkle's Estate v. Commissioner, 3rd Cir., 1942, 129 F. 2d 386; Commissioner v. Wilder's Estate, 5th Cir., 1941, 118 F. 2d 281, cert. den., 314 U.S. 634.

Clise case clearly establishes that the court considered that the economic benefits were retained by the purchaser of a joint and survivorship annuity.⁴

For this reason, the Court holds that the annuity contracts purchased by Mrs. Grant were includable in her gross estate under 26 U.S.C.A. §811 (c) (1) (B) as a transfer under which she retained for her life the possession or enjoyment of, or the right to the income from, the property transferred.

Valuation

Having concluded that the annuities were includable in the gross estate, the next question is what was the proper valuation that should have been placed upon them. The pertinent treasury regulation is set out in the margin.⁵

⁴The Court said at page 1003, "Unquestionably Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts during her lifetime. This is true, just as surely as though she had created a trust fund with her property—money, and reserved to herself a certain sum annually, to be paid out of income and corpus, with the remainder over. Mrs. Clise reserved to herself the complete enjoyment of her property, during her lifetime, to the extent she desired to enjoy it, relieved of the worry and cares of management, and guaranteed an estate to the object of her bounty after her death. It is clear, therefore, that Mrs. Clise retained to herself the economic benefits of her property during her lifetime."

⁵26 C.F.R. §81.10. Treas. Reg. 105, §81.10. "Valuation of Property. (a) General—* * *. All rele-

The government's position is that what Mr. Grant has now is in effect a single life annuity and the proper basis for valuation is what comparable single life annuities cost. It is stipulated that on March 2, 1947, the cost to Mr. Grant of a single premium life annuity contract paying to him \$20,-774.20 annually for the remainder of his life would have been \$257,117.20.

The plaintiff contends that this does not give a true valuation because it ignores the survivorship aspect of the annuities which in fact existed at the time of Mrs. Grant's death and further does not reflect the true value from an economic benefit standpoint. Plaintiff contends that comparable contracts are survivorship contracts, or, in the alternative,

vant facts and elements of value as of the applicable valuation date should be considered in every case.

* * *

“(i) Annuities, life, remainder and reversionary interests——

* * *

“(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

“(3) All other future payments are to be discounted upon the basis of compound interest at the rate of four per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth.”

* * *

that if there are no comparable contracts, the valuation must be on an actuarial basis.

The Mearkle case, *supra* note (3), is a case where the Court held that the value of similar annuity contracts was the proper method of valuation. There is no definite statement, but it appears from the language of the opinion at Page 388 that single life annuities were used as the "comparable contracts" to survivorship annuities after the death of one of the annuitants. To the same effect is *Estate of John L. Walker*, 1947, 8 T.C. 1107.

There are two Tax Court cases that come to different results than the above cited cases.⁶ In the Higgs case the Tax Court first held a particular survivorship annuity includable. As to value, the Commissioner had used the value of a single life annuity rather than a survivorship annuity. The petitioner claimed that the cost of a survivorship annuity was the true value. This the Court rejected for lack of proof. This proof was later supplied and the Tax Court reduced the Commissioner's valuation from the cost of a single life annuity to the cost of a survivorship annuity. See the Circuit Court opinion at Page 428, footnote (1). The Circuit Court reversed this decision as to the includability, making it unnecessary for it to discuss the valuation. In the

⁶*Estate of Higgs*, 1949, 12 T.C. 280, reversed, *Higgs v. Commissioner*, 3rd Cir., 1950, 184 F. 2d 427; *Estate of Twogood*, 1950, 15 T.C. 989, *aff'd.*, *Commissioner v. Twogood*, 2nd Cir., 1952, 194 F. 2d 627.

Twogood case, in its Findings of Fact at Page 992, the Tax Court fixed the valuation as the cost of a survivorship annuity at the date of death rather than a single life annuity. However, there was no other discussion of valuation since the Court's decision was that the particular annuity was not includable in the gross estate. (The facts in the Twogood case are very similar to those in the Higgs case.)

From an economic benefit standpoint, it appears to this Court that neither single life nor survivorship annuities are comparable to what Mr. Grant received at his wife's death. Under the income tax laws, three per cent of the cost of the annuities (\$390,000.00) must be reported as income each year. Thus, \$11,700.00 of the \$20,774.20 received each year by Mr. Grant is subject to income tax. If, as is contended by the government, the true valuation is the cost of single life annuities, the holder of \$257,117.20 worth of annuities would have to pay a tax on about \$7,713.00 of his \$20,774.00 annual return, or about \$4,000.00 less than what Mr. Grant actually pays tax on. From an income tax standpoint, it appears that the "comparable contracts" the government uses are much more valuable than what Mr. Grant actually has.⁷ It is not enough to say that the income tax statutes are not in *pari materia* with estate tax statutes. Income tax consequences are "relevant

⁷Income tax statutes have now remedied this situation [18 U.S.C.A. §22(b) (2) (C)], but the remedy is not applicable to this estate.

facts and elements of value''⁸ which the regulations say are to be considered in the valuation of annuities.

Without considering interest, Mr. Grant would have to live about thirteen years after his wife's death to recover his principal if the government's valuation were used. This is about 30 per cent greater than his actual life expectancy at the time of his wife's death. If interest is considered, the length of time Mr. Grant would have to live to recover his principal is greatly extended.

A survivorship contract purchased just before Mrs. Grant's death would cost \$60,980.72. Such a contract, for income tax purposes, might be more valuable for a few years to Mr. Grant than what he has, but thereafter it would be less valuable because after the return of its cost all of the income would be taxable annually for income tax purposes.

Of course, also, each of the parties was considerably older on March 2, 1947, than when the survivorship contracts were first purchased, and their life expectancies had correspondingly changed.

This Court does not believe that such a survivorship contract is "comparable" to what was purchased by decedent in 1938 and 1939, or to what Mr. Grant received by reason of decedent's death in 1947.

The Court is not unmindful of the Treasury Regu-

⁸See Treas. Reg. 105 set out in the margin on Page 6.

lation which says that the value of annuities is to be determined by the value of comparable annuities⁹ and makes no attack on the validity of this regulation.¹⁰ But the regulation says value is to be established by “comparable contracts.” If this means comparable in type, certainly the single life contract is not comparable to the survivorship contract. If it means comparable in value, neither the single life nor the survivorship contracts are comparable to what Mr. Grant now has. When there is no comparable contract, other methods of valuation must be resorted to.¹¹

Conclusion

The Court concludes therefore that the true value of the annuity contracts as of the date of Mrs. Grant's death is represented by the Actuaries or Combined Experience Table of Mortality and established actuarial principles as set out in Treasury Regulation 105, Section 81.10 (a)(i)(3). See footnote (5) at Page 6. This value has been stipulated to be \$160,399.45. At even a small rate of interest, in order to recover this “principal,” Mr. Grant will have to live many years past his life expectancy.

It is hereby ordered that judgment be in favor of

⁹See Treas. Reg. 105 set out in the margin on Page 6.

¹⁰*Meerkle's Estate v. Comm.*, 3rd Cir., 1942, 129 F. 2d 386.

¹¹Treas. Reg. 105, §81.10 and 81.10(a)(i)(3) on Page 6.

plaintiff and against defendant in the sum of \$28,603.43, together with interest and the costs of this suit.

Let plaintiff prepare judgment to conform to the above opinion.

Dated: June 30, 1954.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed July 1, 1954.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

Civil No. 31582

SPENCER GRANT, Executor of the Last Will
and Testament of BLANCHE KELLEHER
GRANT, Deceased,

Plaintiff,

vs.

JAMES G. SMYTH, Former Collector of Internal
Revenue,

Defendant.

JUDGMENT

This action came on regularly for trial before the above-entitled Court, the Honorable O. D. Hamlin, judge thereof, presiding without a jury, on March 26, 1954. The plaintiff appeared by Henry V. Colby, Esq., and the defendant appeared by George A.

Blackstone, Esq., Assistant United States Attorney. The cause was argued and duly submitted to the Court for decision and judgment. The Court has fully considered the matter, including the briefs filed by the respective parties, and has filed and entered herein its memorandum Opinion containing its findings of fact and conclusions of law and ordering that judgment be in favor of plaintiff and against defendant in the sum of \$28,603.43, together with interest and costs of this suit;

It Is, Thereupon, Ordered and Adjudged that plaintiff, Spencer Grant, as Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, do have and recover from the defendant, James G. Smyth, former Collector of Internal Revenue, the sum of \$28,603.43, together with interest thereon at the rate of 6% per annum from September 22, 1950, to a date preceding the date of the refund check by not more than thirty days, and together with plaintiff's cost of suit herein incurred in the sum of \$39.00.

Done in open Court this 14th day of July, 1954.

/s/ O. D. HAMLIN,

United States District Judge.

Approved as to form, as provided in Rule 5(d).

/s/ GEORGE A. BLACKSTONE,

Assistant United States

Attorney.

[Endorsed]: Filed July 14, 1954.

Entered: July 15, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFF

Notice is hereby given that Spencer Grant, as Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 15, 1954.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 9, 1954.

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents:

That Spencer Grant, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, as Principal, and Pacific Indemnity Company, a California corporation, as Surety, are held and firmly bound unto James G. Smyth, former Collector of Internal Revenue, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid to the said James G. Smyth, former Collector of Internal Revenue, his succes-

sors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents, and

Whereas, Spencer Grant, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse an order of the Honorable O. D. Hamlin, United States District Judge of the above-entitled Court, signed and filed on July 14, 1954.

Now, Therefore, the condition of the above obligation is such that if said Spencer Grant, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, shall prosecute its said appeal to effect and answer all costs which may be adjudged against him if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, Sealed and Dated this 8th day of September, 1954.

/s/ SPENCER GRANT,
Executor of the Last Will and Testament of Blanche
Kelleher Grant, Deceased.

PACIFIC INDEMNITY
COMPANY,

By /s/ J. W. MAYNARD, JR.,
Attorney-in-Fact.

Approved:

.....,
Judge.

State of California,
City and County of San Francisco—ss.

On this 8th day of September in the year one thousand nine hundred and fifty-four before me, Emily K. McCorry, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. W. Maynard, Jr., known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said J. W. Maynard, Jr., acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ EMILY K. McCORRY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires December 21, 1954.

[Endorsed]: Filed Sept. 9, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY DEFENDANT

Notice Is Hereby Given that defendant James G. Smyth hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on July 15, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Defendant James G. Smyth.

[Endorsed]: Filed Sept. 10, 1954.

[Title of District Court and Cause.]

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEAL

Plaintiff and defendant both having appealed from the final judgment entered in this action on July 15, 1954, they hereby stipulate that the record on appeal shall include the following:

- (1) Complaint;
- (2) Answer to Complaint;
- (3) Stipulation of Facts;
- (4) Reporter's Transcript;
- (5) Joint Exhibits 1 through 16, both inclusive,
and Plaintiff's Exhibit 17;
- (6) The Opinion of the Court, dated June 30,

1954, which contains the Court's findings of fact, conclusions of law and direction for entry of judgment thereon;

(7) The Judgment entered herein on July 15, 1954;

(8) Plaintiff's and defendant's respective Notices of Appeal with dates of filing;

(9) This Stipulation.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff-Appellant Spencer Grant.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for Defendant-Appellant James G. Smyth.

[Endorsed]: Filed Sept. 21, 1954.

The United States District Court, Northern District
of California, Southern Division

No. 31582

SPENCER GRANT, Executor of the Last Will
and Testament of BLANCHE KELLEHER
GRANT, Deceased,

Plaintiff,

vs.

JAMES G. SMYTH, Former Collector of Internal
Revenue,

Defendant.

REPORTER'S TRANSCRIPT

Friday, March 26, 1954

Appearances:

For the Plaintiff:

McKEON & COLBY,
SLACK & ZOOK, by
HENRY V. COLBY, ESQ.

For the Defendant:

LLOYD H. BURKE,
United States Attorney, by
GEORGE A. BLACKSTONE,
Assistant United States Attorney.

* * *

Mr. Colby: The stipulation of facts provides that we may introduce in evidence as joint exhibits photostats of the annuity contracts involved in this case. There are 14 of them. I am going to say, your

Honor, as a matter of shortening time, that they be offered in evidence to be marked, respectively, as joint exhibits Nos. 1 through 14.

The Court: Is that agreeable, counsel?

Mr. Blackstone: That is agreeable, your Honor.

Mr. Colby: And for the information of the Reporter or the Clerk, each one has a pencil numeral on the back and if they are marked in that order they will be alphabetical and chronological.

(Thereupon photostatic copies of the following-described contracts were received in evidence and marked as indicated: [23*])

(Joint Exhibit 1—Aetna Life Insurance Company of Hartford, Connecticut, No. AN-18809.

(Joint Exhibit 2—Aetna Life Insurance Company of Hartford, Connecticut, No. AN-18810.

(Joint Exhibit 3—Connecticut General Life Insurance Company, Hartford, Connecticut, No. 56921.

(Joint Exhibit 4—The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, No. 13523.

(Joint Exhibit 5—Metropolitan Life Insurance Company, No. 296-AB-2.

(Joint Exhibit 6—Metropolitan Life Insurance Company, No. 2297-AB-2.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Joint Exhibit 7—Pacific Mutual Life Insurance Company, No. 972085.

(Joint Exhibit 8—Pacific Mutual Life Insurance Company, No. 987534.

(Joint Exhibit 9—The Prudential Insurance Company of America, No. A-21422.

(Joint Exhibit 10—The Prudential Life Insurance Company of America, No. A-22937.

(Joint Exhibit 11—Sun Life Assurance Company of Canada, No. A-121202.

(Joint Exhibit 12—Sun Life Assurance Company of Canada, No. A-122793. [24]

(Joint Exhibit No. 13—The Travelers Insurance Company, Hartford, Connecticut, No. 2109941.

(Joint Exhibit No. 14—The Travelers Insurance Company, Hartford, Connecticut, No. 2111175.)

Mr. Colby: Secondly, we are offering in evidence as a joint exhibit a photostatic copy of the Grant estate tax return.

At this point I do wish to ask Government counsel if it is not correct that the insurance company letters and statements attached to the return and setting forth the costs for contracts bearing numbers similar to those in exhibits as Joint Exhibits 1 through 14 are the costs of what we are calling for convenience single life contracts?

Mr. Blackstone: Yes; that is correct.

Mr. Colby: At this point, your Honor, and for the record, I wish to interpose an objection to the introduction in evidence of these insurance company statements and letters to which I have referred which give the costs of single life contracts on the ground that those costs are irrelevant and immaterial. I base that objection, of course, on the score that the true measure of value, if we adopt the comparable contract rule, is the cost of survivorship contracts. The objection goes to the heart of that valuation issue, and I suggest to the Court to defer its ruling until the case is decided because the decision of the case [25] will determine whether that ruling is valid or not.

In other words, I am merely saying I object to the evidence of the cost of single life contracts because the true measure is the cost of survivorship contracts, and Mr. Blackstone, I believe, is going to correspondingly object to my letters from the insurance companies giving the cost of survivorship contracts. It is a technical objection in a way and yet it must be made, I suppose, and I suggest that the Court defer its ruling until the case is decided because the decision of the case is by definition going to determine whether one or the other is immaterial.

The Court: I don't know that that would be the Court's ruling. Just considering it now, no matter what determination the Court might make in reaching that determination, it might be proper for him to consider the costs one way or the other of either side, and for that reason they would be admissible,

although whatever answer the Court came to might be one way or the other.

Mr. Colby: Your Honor, I am prepared to state my agreement with that. I believe myself that the Court should properly have before it the costs of both types of contracts and then make its determination as to which type of contract is comparable. I only make the objection at this moment to the Government's records here of the costs of single life contracts because the Government is going to [26] make a corresponding objection. If the Court is prepared to overrule my objection and correspondingly overrule the Government's objection, I am going to withdraw my objection.

The Court: That would be my thought, that both of them should go in.

Mr. Blackstone: That is agreeable. We raised this point, Mr. Coby and I, in discussing how the case should be presented, because of the view from the tax division of the Attorney General's Office that the cost basis asserted by Mr. Colby is incorrect, and they suggested that we object to the introduction of such evidence, but it is as——

The Court: Both of you maintain your positions. Why don't you leave your objections there and I will rule—overrule both of them, and admit it?

Mr. Coby: I withdraw my objection, your Honor.

The Court: And you follow your Attorney General's suggestion—and you have made your objection. The cost of these single life contracts is contained in letters in the estate tax return exhibit?

Mr. Colby: Yes, your Honor.

The Court: Then you are offering the estate tax return the next exhibit in order?

Mr. Colby: I am, pursuant to stipulation, but the copy the Government has furnished was prepared in Washington and [27] has a blue ribbon connecting to the return a variety of other papers, including these life insurance company letters.

The Court: Is there anything else except——

Mr. Colby: The only thing to which the objection pertains is the insurance company letters and in some instances forms 712 from the insurance companies referring by number to the identical annuity contracts in evidence already as Joint Exhibits 1 through 14, because there were in addition to these annuity contracts some life insurance policies and there are attached to this return some forms 712 from the life insurance companies with respect to the life insurance contracts. Of course those have no bearing in this case. The objection goes only to the ones pertaining to the annuity contracts now in evidence.

The Court: The Exhibit may be admitted and marked Joint Exhibit 15.

(Thereupon estate tax return with accompanying statements and letters, was received in evidence and marked Joint Exhibit No. 15.)

Mr. Colby: There has also been stipulated, if your Honor please, there may be offered in evidence as Joint Exhibit 16, a photostatic copy of the Revenue Agent's deficiency report dated July 18, 1950.

The Court: That may be admitted and take that number.

(Thereupon Revenue Agent's report, as [28] per stipulation, was received in evidence and marked Joint Exhibit No. 16.)

Mr. Colby: I next offer in evidence a group of letters from the same insurance companies which issued these contracts and also the same companies of course, which furnished the letters and statements to which I have objected, which are attached to the return from these companies giving the costs of survivorship contracts.

Do you want to make an objection before I offer them?

Mr. Blackstone: Your Honor, I do not object to the lack of authentication of the letters. We will concede that they may be taken in evidence without further authentication. We do make the objection on the ground of relevancy, just as Mr. Colby made the objection to the letters attached to the estate tax on the ground of irrelevancy.

The Court: The objection may be overruled and the exhibit may be marked Joint Exhibit 17.

Mr. Blackstone: May it please your Honor, may those be marked as Plaintiff's own exhibit rather than as a joint exhibit?

The Court: Plaintiff's Exhibit 17.

(Thereupon group of letters re costs of survivorship contracts was received in evidence and marked Plaintiff's Exhibit No. 17.) [28]

Mr. Colby: I believe it is correct, Mr. Blackstone, that the last paragraph of each of these letters states:

“We have previously furnished you with the amount of the gross premium we would have charged on March 2, 1947, for single life annuity contracts,”

and so forth, and that reference to single life contract costs are the costs set forth in the letters and statements to which I have objected, which are attached to the return?

Mr. Blackstone: That is correct.

Mr. Colby: For the record, I would like to have Government counsel's concession that the Government is not making any contention that there was any transfer here in contemplation of death.

Mr. Blackstone: We will concede that, your Honor.

Mr. Colby: So that if these annuity contracts were includable in Mrs. Grant's gross estate, it was because they either represented a postponed enjoyment transfer to Mr. Grant or a retained enjoyment transfer by Mrs. Grant under 811(c).

May I have your agreement, also, Mr. Blackstone, that you and I arranged with the local office of the Estate Tax Audit Division to compute the amount of the overpayment and that on the basis of the computation made by the Audit Division the maximum recovery, if we should prevail either [30] on our excludability argument or on our survivorship contract evaluation argument, was \$29,397.68, and that

if we should prevail only, if at all, on our actuarial formula valuation argument, the maximum recovery would be \$28,603.43?

Mr. Blackstone: Those figures are correct.

Mr. Colby: The complaint prays for recovery of a slightly lesser amount, to wit, \$28,356.41, and I suggest that as a matter of convenience at this time that instead of moving to amend the complaint on its face, if the plaintiff should recover judgment, that it not be agreed that if the plaintiff should recover judgment for either of the amounts just previously mentioned, that the complaint and the answer correspondingly may be deemed amended accordingly to conform to proof.

Mr. Blackstone: I think that is all right, your Honor.

The Court: All right. [31]

* * *

JOINT EXHIBIT No. 1

(Filed March 26, 1954)

Ages: 59

57 11/12

The Aetna Life Insurance Company
of Hartford, Connecticut
(herein called the Company)

No. AN 18-809

Annuity Payment
\$1,973.40 Annually

(1) In Consideration of the applications for this contract, which applications are hereby made a part hereof and copies of which are attached hereto, and in further consideration of the single premium of Thirty-eight Thousand Fifteen Dollars and Ninety-five Cents to be paid to the Company upon delivery of this contract, which delivery shall be a receipt for such premium,

(2) Hereby Agrees to Pay One Thousand Nine Hundred Seventy-three & 40/100th Dollars at its Home Office if Spencer Grant of San Francisco, California or Blanche Kelleher Grant of San Francisco, California, (herein called the annuitants), shall be living on the first day of October, one thousand nine hundred and thirty-nine, and to pay a like amount at the same place on the same day of each succeeding October during the lifetime of any one of the annuitants, provided that at every such payment satisfactory proof shall be furnished to the Company that at least one of the annuitants be then

living, and that such payments shall terminate with the last payment preceding the death of the last survivor of the annuitants.

At the death of the last survivor of the annuitants this contract shall become null and void and the premium paid hereon shall remain the property of the Company.

(3) Each annuity payment becoming due under this contract shall be payable when due to said Blanche Kelleher Grant or said Spencer Grant, Provided However, that no annuity payments shall be payable to any annuitant who is then deceased.

(4) This contract and the applications herefor constitute the entire contract between the parties hereto and it shall be incontestable after it has been in force during the lifetime of the annuitants for a period of two years from its date of issue; but if there has been any misstatement of age in the applications herefor, the amount payable hereunder shall be such an amount as the premium paid would have purchased at the Company's rate now in use for the correct ages.

(5) The reserve for which funds are to be held upon this contract shall be computed on the basis of the Combined Annuity Tables with interest at four per centum per annum.

(6) This contract shall not be entitled to share in the surplus earnings of the Company.

Single Premium.

Non-Participating.

Joint and Survivor Annuity.

JOINT EXHIBIT No. 2

(Filed March 26, 1954)

Ages: 59

57 11/12

The Aetna Life Insurance Company
of Hartford, Connecticut
(herein called the Company)

No. AN 18 810

Annuity Payment
\$657.80 Annually

(1) In Consideration of the applications for this contract, which applications are hereby made a part hereof and copies of which are attached hereto, and in further consideration of the single premium of Eleven Thousand Nine Hundred Eighty-four Dollars and Five Cents to be paid to the Company upon delivery of this contract, which delivery shall be a receipt for such premium,

(2) Hereby Agrees to Pay Six Hundred Fifty-seven & 80/100ths Dollars at its Home Office if Spencer Grant of San Francisco, California, or Blanche Kelleher Grant of San Francisco, California, (herein called the annuitants), shall be living on the first day of October, one thousand nine hundred and forty, and to pay a like amount at the same place on the same day of each succeeding October during the lifetime of any one of the annuitants, provided that at every such payment satisfactory proof shall be furnished to the Company that at least one of the annuitants be then living, and

that such payments shall terminate with the last payment preceding the death of the last survivor of the annuitants.

At the death of the last survivor of the annuitants this contract shall become null and void and the premium paid hereon shall remain the property of the Company.

(3) Each annuity payment becoming due under this contract shall be payable when due to said Blanche Kelleher Grant or said Spencer Grant, Provided However, that no annuity payments shall be payable to any annuitant who is then deceased.

(4) This contract and the applications herefor constitute the entire contract between the parties hereto and it shall be incontestable after it has been in force during the lifetime of the annuitants for a period of two years from its date of issue; but if there has been any misstatement of age in the applications herefor, the amount payable hereunder shall be such an amount as the premium paid would have purchased at the Company's rate now in use for the correct ages.

(5) The reserve for which funds are to be held upon this contract shall be computed on the basis of the Combined Annuity Tables with interest at four per centum per annum.

(6) This contract shall not be entitled to share in the surplus earnings of the Company.

Single Premium

Non-Participating.

Joint and Survivor Annuity.

JOINT EXHIBIT No. 3

(Filed March 26, 1954)

Connecticut General Life Insurance Company
Hartford, Conn.

Hereby agrees to pay at its Home Office in Hartford, Connecticut: to Spencer Grant and Blanche K. Grant equally, or to the survivor (hereinafter called the Annuitants) \$646.24 on March 28, 1939, if the said Annuitants, or either one of them be then living, and the sum of Twenty-six Hundred Twenty-nine and No/100 Dollars on the 28th day of March, 1940, if the said Annuitants or either one of them be then living, and a like amount annually thereafter during the subsequent lifetime of the said Annuitants.

The consideration for this contract is the application, a copy of which is attached hereto and made a part of this contract, and the payment in advance of the single premium of \$50,000.00.

Benefits and Provisions

Payment of Premium.

This contract shall not take effect until the single premium is actually paid as hereinafter provided.

The premium is due and payable in advance at the Home Office or to an authorized agent of the Company in exchange for the Company's receipt signed by the President or Secretary and countersigned by the agent designated therein.

Non-Participation.

This contract is not entitled to share in surplus distribution.

Income Payments.

The Company will make each income payment by check which must be personally endorsed by the Annuitants, or other evidence of the survival of one of the Annuitants must be furnished.

Incontestability.

This contract shall be incontestable after one year from its date of issue except for non-payment of premium but if the age of either of the Annuitants has been misstated, the amount payable hereunder shall be such as the actual money paid would have purchased at the correct ages; any over-payment by the Company, with compound interest thereon at 6% per annum, shall be charged against the payments to be made after adjustment.

Assignment.

The Company shall not be affected by any assignment of this contract until the original assignment or certified copy thereof shall be delivered at its Home Office; and the Company does not assume responsibility for the validity or sufficiency of any assignment.

General Provisions.

This contract and the application therefor constitute the entire contract between the parties and

all statements made in the application shall, in the absence of fraud, be deemed representations and not warranties. No statement shall be used in defense of a claim under this contract unless it is contained in the written application and a copy of the application is attached to this contract when issued.

Only the President, Vice President, Secretary or Assistant Secretary has power in behalf of the Company to make or modify this contract.

Reserve.

The reserve on this contract is based on the Modified American Annuitants' Tables with interest at the rate of 3% per annum.

In Witness Whereof the Connecticut General Life Insurance Company has caused this contract to be executed at its office in the city of Hartford, the 28th day of December, 1938.

[Officers' signatures.]

/s/ J. B. WILDE,
President.

Number 56921

Ages: 58 11/12

57 11/12

Single Premium Life Annuity. Non-Participating.
Payable During Lifetime of Last Survivor.

JOINT EXHIBIT No. 4
(Filed March 26, 1954)

The Connecticut Mutual Life Insurance Company
of Hartford, Connecticut
Established 1846

No. 13,523

Ages: 58 11/12

57 11/12

Agrees to Pay

an Income of \$335.86 on April 1, 1939, and Thirteen Hundred Fourteen and 25/100 Dollars Annually thereafter to Spencer Grant and Blanche K. Grant (herein called the Annuitants) jointly, and to the survivor of them, beginning on the 1st day of April, 1940, if either or both of the Annuitants be then living, and terminating with the last payment due prior to the death of the survivor of the Annuitants. If both of the Annuitants shall die prior to the 1st day of April, 1939, no payment shall be made by the Company on account of this Contract.

Ages of Annuitants.

If the age of either of the Annuitants has been misstated any sum payable hereunder shall be such as the premium paid would have purchased at the correct age. Any overpayments by the Company on account of misstatement of age shall, with interest at a rate to be determined by the Company not exceeding 6% per annum, be charged against the current or next succeeding payments to be made by the Company under this Contract.

Reserves.

The reserves on this Contract are based upon the American Annuitants Mortality Table and 3% compound interest.

Evidence of Contract.

This Contract shall constitute the entire contract between the parties.

Settlement.

Any and every sum due under this Contract shall be payable only at the Home Office of the Company in Hartford, Connecticut.

This Contract is made in consideration of the Payment of the Single Premium of \$25,000.00, receipt of which is hereby acknowledged.

In Witness Whereof, The Connecticut Mutual Life Insurance Company has caused this Contract to be executed at Hartford, Connecticut, this 2nd day of January, A.D. 1939.

[Officers' signatures.]

Single Premium Life Annuity.

Joint and Survivor.

Non-Participating.

JOINT EXHIBIT No. 5

(Filed March 26, 1954)

Metropolitan Life Insurance Company

No. 2296 A.B. 2

Joint and Survivor Annuity

Ages: $57\frac{3}{4}$ & $58\frac{3}{4}$

Purchase Price: \$6,521.46

Annuity of: \$328.18

In Consideration

of Sixty-five Hundred Twenty-one & 46/100 Dollars,

Promises to Pay

at the Home Office of the Company in the City of New York to Blanche Kelleher Grant of San Francisco, County of San Francisco, State of California, and to Spencer Grant of San Francisco, County of San Francisco, State of California (herein called the Annuitants), jointly, and, after the first death, to the survivor of them during the lifetime of such survivor, an Annuity of Three Hundred Twenty-eight & 18/100 Dollars, in equal annual payments of Three Hundred Twenty-eight & 18/100 Dollars each, the first payment to be made on the 1st day of April, One Thousand Nine Hundred and Thirty-nine, if either of the Annuitants is then living, and subsequent payments on the 1st day of each April thereafter, said Annuity terminating with the last annual

payment preceding the death of the last surviving Annuitant.

It Is Agreed that said Company shall be furnished with evidence that both or either of the Annuitants is living on each and every date on which an Annuity payment falls due and that no payment will be made until such evidence shall have been received, and that upon the death of the surviving Annuitant there shall be no proportionate payment of this Annuity to the day of such death.

This Annuity is granted upon the declaration that said Annuitants were aged 57 years and 58 years, respectively, at the last anniversaries of their birth, having been born on the 26th day of January, One Thousand Eight Hundred Eighty-one and on the 1st day of January, One Thousand Eight Hundred Eighty respectively, and that if such declaration shall be found untrue then the amount of Annuity payable under this contract shall be such as the actual money paid would have purchased at their true ages; any overpayment or overpayments by the Company, with interest thereon, shall be charged against the payments to be made after adjustment.

This contract does not participate in the surplus of the Company. No person except an Executive Officer (President, Vice-President, Secretary or Actuary) of the Company has power to modify this contract of which the provisions on next page are a part.

In Witness Whereof, the Company has caused

this contract to be executed this 28th day of December, 1938.

[Officers' signatures.]

Single Payment Joint and Survivor Annuity
Non-participating

JOINT EXHIBIT No. 6
(Filed March 26, 1954)

Metropolitan Life Insurance Company

No. 2297 A.B. 2

Joint and Survivor Annuity

Ages: $57\frac{3}{4}$ & $58\frac{3}{4}$

Purchase Price: \$18,478.54

Annuity of: \$984.54

In Consideration
of Eighteen Thousand Four Hundred Seventy-eight
and 54/100 Dollars,

Promises to Pay
at the Home Office of the Company in the City of
New York to Blanche Kelleher Grant of San Francisco,
County of San Francisco, State of California,
and to Spencer Grant of San Francisco, County of
San Francisco, State of California (herein called

the Annuitants), jointly, and, after the first death, to the survivor of them during the lifetime of such survivor, an Annuity of Nine Hundred Eighty-four and 54/100 Dollars, in equal annual payments of Nine Hundred Eighty-four and 54/100 Dollars each, the first payment to be made on the 1st day of April, One Thousand Nine Hundred and Forty, if either of the Annuitants is then living, and subsequent payments on the 1st day of each April thereafter, said Annuity terminating with the last annual payment preceding the death of the last surviving Annuitant.

It Is Agreed that said Company shall be furnished with evidence that both or either of the Annuitants is living on each and every date on which an Annuity payment falls due and that no payment will be made until such evidence shall have been received, and that upon the death of the surviving Annuitant there shall be no proportionate payment of this Annuity to the day of such death.

This Annuity is granted upon the declaration that said Annuitants were aged 57 years and 58 years, respectively, at the last anniversaries of their birth, having been born on the 26th day of January, One Thousand Eight Hundred Eighty-one and on the 1st day of January, One Thousand Eight Hundred Eighty respectively, and that if such declaration shall be found untrue then the amount of Annuity payable under this contract shall be such as the actual money paid would have purchased at their

true ages; any overpayment or overpayments by the Company, with interest thereon, shall be charged against the payments to be made after adjustment.

This contract does not participate in the surplus of the Company. No person except an Executive Officer (President, Vice-President, Secretary or Actuary) of the Company has power to modify this contract of which the provisions on next page are a part.

In Witness Whereof, the Company has caused this contract to be executed this 28th day of December, 1938.

[Officers' signatures.]

Single Payment Joint and Survivor Annuity
Non-participating

JOINT EXHIBIT No. 7
(Filed March 26, 1954)

Number 972085

Pacific Mutual Life Insurance Company
Will Pay

Annuity.

Fourteen Hundred Twenty-eight and 32/100 Dollars at its Home Office in Los Angeles, California, to Spencer Grant and Blanche Kelleher Grant, jointly

or to the survivor, herein called the Annuitants, on the first day of July, 1940, if the Annuitants, or either of them, be then living, and a like amount on the first day of July in each year thereafter during the life of the Annuitants, or of either of them; payments hereunder to terminate with the last payment due prior to the death of the survivor of the Annuitants, provided, however, as follows:

Misstatement of Date of Birth.

That this Annuity is granted and accepted on the understanding that the Annuitants were born on January 1, 1880, and January 26, 1881, respectively.

That should the date of birth of either of the Annuitants be found to have been misstated, then all payments shall be such as the premium paid would have purchased at the correct ages, and any over-payments or under-payments by the Company resulting from such misstatement, together with Compound interest at 6% per annum, shall be charged against or added to the first payment or payments to be made after such adjustment;

Payment of Premium.

That the premium for this Annuity is due and payable in advance at the Home Office of the Company, but may be paid to any agent of the Company producing a receipt therefor signed by the President, a Vice-President, the Secretary or an Assistant Secretary and countersigned by such agent;

Reserve Basis.

That the reserve held by the Company on this Annuity shall be computed on the Combined Annuity Tables of Mortality with interest at $3\frac{1}{2}\%$ per annum;

Non-Participation.

That this Annuity shall not participate in the surplus earnings of the Company;

Agents.

That agents are not authorized to make, alter or discharge contracts;

Assignment.

That any assignment of this Annuity must be made in writing and that the Company shall not be deemed to have knowledge of any assignment unless the original or a duplicate thereof is filed at the Home Office of the Company and its receipt duly acknowledged; That the Company assumes no responsibility for the validity of any assignment;

Evidence that Annuitants Are Living.

That due proof that the Annuitants, or either of them, are living shall, if required by the Company, be furnished before each payment hereunder shall be made.

Assets Segregation.

The Company conducts a participating life department, a non-participating life department (in which this Annuity is issued) and an accident and health

department. The assets of the non-participating life department and of the accident and health department, to the extent of the reserves required on their respective contract liabilities, and all assets of the participating life department after providing for operating and fixed charges, are held for the benefit and security of the contract holders of each department, respectively. The assets representing corporate capital and corporate surplus are further security for all contracts and other liabilities of the Company.

Premium.

This Annuity is issued in consideration of the application therefor and of the payment in advance of the single premium of Twenty-five Thousand Dollars.

The application for this Annuity, a copy of which is attached hereto and made a part hereof, with this page, constitutes the entire contract between the parties.

In Witness Whereof Pacific Mutual Life Insurance Company has, by its proper officers, signed this Contract at Los Angeles, California, as of the first day of January, 1939, its date of issue.

[Officers' signatures.]

Non-Participating.

Single Premium.

Joint and Survivor Annuity.

JOINT EXHIBIT No. 8

(Filed March 26, 1954)

Number 987534

Pacific Mutual Life Insurance Company

Will Pay

Annuity.

Eight Hundred Three and 23/100 Dollars at its Home Office in Los Angeles, California, to Spencer Grant and Blanche Kelleher Grant, jointly or to the survivor, herein called the Annuitants, on the thirty-first day of December, 1940, if the Annuitants, or either of them, be then living, and a like amount on the thirty-first day of December in each year thereafter during the life of the Annuitants, or of either of them; payments hereunder to terminate with the last payment due prior to the death of the survivor of the Annuitants, provided, however, as follows:

Misstatement of Date of Birth.

That this Annuity is granted and accepted on the understanding that the Annuitants were born on January 1, 1880, and January 26, 1881, respectively.

That should the date of birth of either of the Annuitants be found to have been misstated, then all payments shall be such as the premium paid would have purchased at the correct ages, and any overpayments or underpayments by the Company resulting from such misstatement, together with com-

pound interest at 6% per annum, shall be charged against or added to the first payment or payments to be made after such adjustment;

Payment of Premium.

That the premium for this Annuity is due and payable in advance at the Home Office of the Company, but may be paid to any agent of the Company producing a receipt therefor signed by the President, a Vice-President, the Secretary or an Assistant Secretary and countersigned by such agent;

Reserve Basis.

That the reserve held by the Company on this Annuity shall be computed on the 1937 Standard Annuity Table of Mortality with interest at 3% per annum;

Non-Participation.

That this Annuity shall not participate in the surplus earnings of the Company;

Agents.

That agents are not authorized to make, alter or discharge contracts;

Assignment.

That any assignment of this Annuity must be made in writing and that the Company shall not be deemed to have knowledge of any assignment unless the original or a duplicate thereof is filed at the Home Office of the Company and its receipt duly

acknowledged; That the Company assumes no responsibility for the validity of any assignment;

Evidence that Annuitants Are Living.

That due proof that the Annuitants, or either of them, are living shall, if required by the Company, be furnished before each payment hereunder shall be made.

Assets Segregation.

The Company conducts a participating life department, a non-participating life department (in which this Annuity is issued) and an accident and health department. The assets of the non-participating life department and of the accident and health department, to the extent of the reserves required on their respective contract liabilities, and all assets of the participating life department after providing for operating and fixed charges, are held for the benefit and security of the contractholders of each department, respectively. The assets representing corporate capital and corporate surplus are further security for all contracts and other liabilities of the Company.

Premium.

This Annuity is issued in consideration of the application therefor and of the payment in advance of the single premium of Fifteen Thousand Dollars.

The application for this Annuity, a copy of which is attached hereto and made a part hereof, with this

page, constitutes the entire contract between the parties.

In Witness Whereof Pacific Mutual Life Insurance Company has, by its proper officers, signed this Contract at Los Angeles, California, as of the thirteenth day of November, 1939, its date of issue.

[Officers' signatures.]

Non-Participating.

Single Premium.

Joint and Survivor Annuity.

JOINT EXHIBIT No. 9

(Filed March 26, 1954)

The Prudential Insurance Company of America
(Hereinafter Designated as the Company)

Hereby Grants on the lives of Spencer Grant and Blanche Kelleher Grant, herein designated as the Annuitants, whose respective residences on the date of this Contract are 206 Sansome Street, San Francisco, Calif.; 206 Sansome Street, San Francisco, Calif.

An Annuity of Thirteen Hundred Thirteen and 00/100 Dollars, payable to the Annuitants Spencer Grant or Blanche Kelleher Grant, while both of them are living, and after the death of one of them, to the survivor during the remainder of

his or her lifetime, unless otherwise provided by endorsement on this Contract, in equal annual payments of Thirteen Hundred Thirteen and 00/100 Dollars, at the Home Office of the Company in Newark, New Jersey, on the first day of October in every year during the lifetime of the Annuitants, commencing on the first day of October, 1940, and terminating with the last periodical payment before the death of the Annuitant who is the second to die.

This Annuity is granted upon the condition that said Annitnant, Spencer Grant, was born on the first day of January, 1880, and that said Annuitant, Blanche Kelleher Grant, was born on the twenty-sixth day of January, 1881, and that the ages, calculated to the last completed quarter of a year, of said Annuitants at the date of this Contract are 59 years and $57\frac{3}{4}$ years respectively, but if, in the case of either Annuitant, such date of birth and age shall prove to be incorrect the amount of the Annuity payable under the Contract shall be adjusted in accordance with the correct ages of said Annuitants on the date of the Contract calculated to the last completed quarter of a year, and shall be such as the actual money paid as the purchase price would have purchased at such correct ages according to the Company's published tables of Last Survivor Life Annuity Rates in effect on the date of this Contract. Any overpayments made by the Company prior to such adjustment, with interest thereon at the rate of five per cent per annum, shall

be charged against payments to be made after adjustment, and any under-payments with similar interest shall be paid in full upon such adjustment.

This Contract is made in consideration of the payment on its delivery of the Purchase Price of Twenty-five Thousand and 00/100 Dollars, in one sum, at the Home Office of the Company, or to an agent of the Company in exchange for an official receipt signed by the President or the Secretary and countersigned by an authorized agent of the Company.

This Agreement, together with the provisions printed or written by the Company on the following pages, contains and constitutes the entire Contract between the parties hereto.

In Witness Whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Contract to be signed by its President and its Secretary, and to be duly attested, this third day of January, One Thousand Nine Hundred and Thirty-nine.

[Officers' signatures.]

Ages: 59

57 $\frac{3}{4}$

Last Survivor Life Annuity Contract—Non-Participating.

Annual Annuity Payment, \$1,313.00; First Payment, October 1, 1940.

JOINT EXHIBIT No. 10

(Filed March 26, 1954)

The Prudential Insurance Company of America
(Hereinafter Designated as the Company)

Hereby Grants on the lives of Spencer Grant and Blanche Kelleher Grant, herein designated as the Annuitants, whose respective residences on the date of this Contract are 206 Sansome Street, San Francisco, Calif.; 206 Sansome Street, San Francisco, Calif.

An Annuity of Thirteen Hundred Thirty-eight and 25/100 Dollars, payable to the Annuitants Spencer Grant and Blanche Kelleher Grant, while both of them are living, and after the death of one of them, to the survivor during the remainder of his or her lifetime, unless otherwise provided by endorsement on this Contract, in equal annual payments of Thirteen Hundred Thirty-eight and 25/100 Dollars, at the Home Office of the Company in Newark, New Jersey, on the thirty-first day of December in every year during the lifetime of the Annuitants, commencing on the thirty-first day of December, 1940, and terminating with the last periodical payment before the death of the Annuitant who is the second to die.

This Annuity is granted upon the condition that said Annuitant, Spencer Grant, was born on the first day of January, 1880, and that said Annuitant, Blanche Kelleher Grant, was born on the twenty-

sixth day of January, 1881, and that the ages, calculated to the last completed quarter of a year, of said Annuitants at the date of this Contract are $59\frac{3}{4}$ years and $58\frac{3}{4}$ years, respectively, but if, in the case of either Annuitant, such date of birth and age shall prove to be incorrect the amount of the Annuity payable under the Contract shall be adjusted in accordance with the correct ages of said Annuitants on the date of the Contract calculated to the last completed quarter of a year, and shall be such as the actual money paid as the purchase price would have purchased at such correct ages according to the Company's published tables of Last Survivor Life Annuity Rates in effect on the date of this Contract. Any overpayments made by the Company prior to such adjustment, with interest thereon at the rate of five per cent per annum, shall be charged against payments to be made after adjustment, and any under-payments with similar interest shall be paid in full upon such adjustment.

This Contract is made in consideration of the payment on its delivery of the Purchase Price of Twenty-five Thousand and 00/100 Dollars, in one sum, at the Home Office of the Company, or to an agent of the Company in exchange for an official receipt signed by the President or the Secretary and countersigned by an authorized agent of the Company.

This Agreement, together with the provisions printed or written by the Company on the following

pages, contains and constitutes the entire Contract between the parties hereto.

In Witness Whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Contract to be signed by its President and its Secretary, and to be duly attested, this thirteenth day of November, One Thousand Nine Hundred and Thirty-nine.

[Officers' signatures.]

Ages: $59\frac{3}{4}$

$58\frac{3}{4}$

Last Survivor Life Annuity Contract—Non-Participating.

Annual Annuity Payment, \$1,338.25; First Payment, December 31, 1940.

JOINT EXHIBIT No. 11

(Filed March 26, 1954)

Sun Life Assurance Company of Canada

Head Office: Montreal

(Incorporated in Canada in 1865

as a Limited Company)

No. A-121202.

Ages: 59 Years and

57 Years 11 Months.

Hereby Agrees to Pay

to Spencer Grant and/or Mrs. Blanche Kelleher Grant the sum of One Thousand Three Hundred and Fifteen $79/100$ Dollars on the first day of July, 1939, if the said Spencer Grant or Blanche Kelleher Grant be alive on that date and the sum of Two Thousand Six Hundred and Thirty-one $58/100$ Dollars on the first day of July, 1940, if the said Spencer Grant or Blanche Kelleher Grant, (the Annuitants) be then living and a like amount yearly thereafter on the first day of July in each year during the subsequent joint lifetime of the Annuitants and during the lifetime of the survivor of them.

This policy is issued on the basis of the representations contained in the application therefor and in consideration of the sum of Fifty Thousand Dollars (the purchase price), the payment of which by the said Spencer Grant and Blanche Kelleher Grant is hereby acknowledged.

This policy shall not participate in the surplus of the Company.

All amounts payable or receivable hereunder shall be paid at the Company's office in San Francisco, California, in lawful currency of the United States of America.

The Provisions printed or written by the Company on the following pages form part of the contract and are binding on both parties thereto.

Signed and Sealed at Montreal, this fourth day of January, One Thousand Nine Hundred and Thirty-nine.

[Company seal.]

[Officers' signatures.]

Joint Life and Last Survivor Annuity Policy—
Without Proportionate Payment to Date of
Death—Nonparticipating.

JOINT EXHIBIT No. 12
(Filed March 26, 1954)

Sun Life Assurance Company of Canada
Head Office: Montreal
(Incorporated in Canada in 1865
as a Limited Company)

No. A-122793.

Ages: 59 years 10 months
58 years 9 months

Hereby Agrees to Pay
to Spencer Grant and/or Mrs. Blanche Kelleher Grant the sum of Three Hundred and Fifty-two 38/100 Dollars on the thirty-first day of December, 1939, if the said Spencer Grant or Blanche Kelleher Grant be alive on that date and the sum of Two Thousand Six Hundred and Seventy-nine 53/100 Dollars on the thirty-first day of December, 1940, if the said Spencer Grant or Blanche Kelleher Grant, (the Annuitants) be then living and a like amount yearly thereafter on the thirty-first day of December in each year during the subsequent joint lifetime of the Annuitants and during the lifetime of the survivor of them.

This policy is issued on the basis of the representations contained in the application therefor and in consideration of the sum of Fifty Thousand Dollars (the purchase price), the payment of which by the said Spencer Grant and Blanche Kelleher Grant is hereby acknowledged.

This policy shall not participate in the surplus of the Company.

All amounts payable or receivable hereunder shall be paid at the Company's office in San Francisco, California, in lawful currency of the United States of America.

The Provisions printed or written by the Company on the following pages form part of the contract and are binding on both parties thereto.

Signed and Sealed at Montreal, this seventeenth day of November, One Thousand Nine Hundred and Thirty-nine.

[Company seal.]

[Officers' signatures.]

Joint Life and Last Survivor Annuity Policy—
Without Proportionate Payment to Date of
Death—Nonparticipating.

JOINT EXHIBIT No. 13

(Filed March 26, 1954)

The Travelers Insurance Company
Hartford, Connecticut

Number: 2109941

Annuitants	Date of Birth
Spencer Grant	January 1, 1880
Blanche Kelleher Grant	January 26, 1881
Single Premium	First Annuity Payment
\$25,000	December 31, 1940
Amount of Annuity	Payments Thereafter
\$1,346.72	Annually

By this Annuity Contract Agrees to Pay to the above-named Annuitants, jointly, the amount of annuity stated above on the date specified for the First Annuity Payment and a like amount at the intervals specified for Payments Thereafter during the joint lives of the Annuitants upon receipt and approval by the Company of due proof that all of the Annuitants are living on the due date of each such payment.

Survivor.

Upon the death of any of the said Annuitants the Company will make the annuity payments on the same dates during the lives of the Survivors or Survivor upon receipt and approval of similar proof.

Upon the death of the Survivor all liability of the Company hereunder shall thereupon cease and the contract shall be at an end.

Premium.

This contract is issued in consideration of the signed applications for this annuity which are made a part hereof and copies of which are attached hereto and of the single premium hereinabove stated payable on the delivery of this contract in exchange for a receipt signed by the President or a Secretary and countersigned by an authorized agent of the Company.

Age.

Upon the declaration that the Annuitants were born on the respective dates of birth stated above this annuity is granted and accepted, but if the age of any Annuitant was incorrectly stated any amount payable hereunder shall be such as the premium paid would have purchased at the true ages of the Annuitants.

No agent can make, alter or discharge this contract or extend the time for payment of premium, nor can this contract be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, in compliance with the law of the state in which the contract is issued, signed by the President or one of the Vice-Presidents or Secretaries, whose authority will not be delegated.

Incontestability.

This contract shall be incontestable after it shall have been in force for a period of two years from its date of issue. It is free from conditions as to residence, occupation, travel or place of death.

Reserve Basis.

The reserve for which funds are to be held upon this contract shall be computed upon the Combined Annuity Tables with interest at 4% per annum by the net level premium reserve method.

Entire Contract.

This instrument and the applications constitute the entire contract between the parties hereto.

In Witness Whereof The Travelers Insurance Company has caused this instrument to be executed at Hartford, Connecticut, this Seventeenth day of November, 1939.

[Officers' signatures.]

Longer Life Annuity.

Joint and Survivor.

Single Premium.

Non-Participating.

JOINT EXHIBIT No. 14

(Filed March 26, 1954)

The Travelers Insurance Company
Hartford, Connecticut

Number: 2111175

Annuitants	Date of Birth
Spencer Grant	January 1, 1880
Blanche Kelleher Grant	January 26, 1881
Single Premium	First Annuity Payment
\$25,000	December 31, 1940
Amount of Annuity	Payments Thereafter
\$1,346.72	Annually

By this Annuity Contract Agrees to Pay to the above-named Annuitants, jointly, the amount of annuity stated above on the date specified for the First Annuity Payment and a like amount at the intervals specified for Payments Thereafter during the joint lives of the Annuitants upon receipt and approval by the Company of due proof that all of the Annuitants are living on the due date of each such payment.

Survivor.

Upon the death of any of the said Annuitants the Company will make the annuity payments on the same dates during the lives of the Survivors or Survivor upon receipt and approval of similar proof.

Upon the death of the Survivor all liability of the Company hereunder shall thereupon cease and the contract shall be at an end.

Premium.

This contract is issued in consideration of the signed applications for this annuity which are made a part hereof and copies of which are attached hereto and of the single premium hereinabove stated payable on the delivery of this contract in exchange for a receipt signed by the President or a Secretary and countersigned by an authorized agent of the Company.

Age.

Upon the declaration that the Annuitants were born on the respective dates of birth stated above this annuity is granted and accepted, but if the age of any Annuitant was incorrectly stated any amount payable hereunder shall be such as the premium paid would have purchased at the true ages of the Annuitants.

No agent can make, alter or discharge this contract or extend the time for payment of premium, nor can this contract be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, in compliance with the law of the state in which the contract is issued, signed by the President or one of the Vice-Presidents or Secretaries, whose authority will not be delegated.

Incontestability.

This contract shall be incontestable after it shall have been in force for a period of two years from its date of issue. It is free from conditions as to residence, occupation, travel or place of death.

Reserve Basis.

The reserve for which funds are to be held upon this contract shall be computed upon the Combined Annuity Tables with interest at 4% per annum by the net level premium reserve method.

Entire Contract.

This instrument and the applications constitute the entire contract between the parties hereto.

In Witness Whereof The Travelers Insurance Company has caused this instrument to be executed at Hartford, Connecticut, this Twenty-fifth day of November, 1939.

[Officers' signatures.]

Longer Life Annuity.

Joint and Survivor.

Single Premium.

Non-Participating.

JOINT EXHIBIT No. 15

(Filed March 26, 1954)

Form 706

Treasury Department

Internal Revenue Service

United States

Estate Tax Return

(To be executed and filed in duplicate)

Estates of nonresidents not citizens of the United States may generally file on Form 706NA instead of this form. For details see back of sheet XX.

Decedent's name: Blanche Kelleher Grant.

Date of death: March 2, 1947.

Residence (domicile) at time of death: San Francisco, California.

Citizenship (nationality) at time of death: United States of America.

Joint Exhibit No. 15—(Continued)

Schedule E

Jointly Owned Property

(See instructions on reverse of the preceding sheet)

(1) Did the decedent, at the time of his death, own any property as a joint tenant or as a tenant by the entirety, with right of survivorship? (Answer "Yes" or "No.")

Yes.

(2) If so, state the name and address of each surviving cotenant.

Spencer Grant, surviving husband, 206 Sansome Street, San Francisco 4, California.

Item No.	Description	Value at Date of Death
1	Joint Savings Account No. 1194 with Bank of Montreal, San Francisco, California	\$22,774.73
	Less contribution by Spencer Grant ..	3,725.94
		<hr/> \$ 19,048.79
2	Joint Commercial Account in Bank of Montreal, San Francisco, Cali- fornia	\$ 8,324.64
	Less outstanding checks	275.50
		<hr/> 8,049.14
3	Joint Savings Account No. 6401 with Crocker First National Bank of San Francisco	\$ 7,624.73
	Less contribution by Spencer Grant ..	1,906.18
		<hr/> 5,718.55
4	Home at 55 Laurel Street, San Fran- cisco, net sale price	\$50,000.00
	Less contribution by Spencer Grant ..	12,500.00
		<hr/> 37,500.00

Joint Exhibit No. 15—(Continued)

5	Cottage and land at Brockway, Lake Tahoe, California, (description attached)	\$12,500.00	
	Contents	500.00	
		<hr/>	
		\$13,000.00	
	Less contribution by Spencer Grant ..	3,250.00	9,750.00
		<hr/>	
6	Decedent owned Series G bonds in joint names, all purchased by her, of the face value of		2,500.00
7	Joint and several annuity policies, as shown on schedule annexed, valued according to Table A of Regulations 105, with adjustment for first payments before the end of the first year at		160,399.45
Note: In 1944 and 1945, Spencer Grant purchased with his own funds \$5,000 Series G bonds payable to himself or the decedent.			
		<hr/>	
	Total (also enter under the Recapitulation, Schedule O)		\$242,965.93

Estate of Blanche Kellcher Grant, Deceased.

EXHIBIT A

Estate of Blanche K. Grant
(Schedule E, Item 7)

Valuation of joint and survivor annuities under Table A of Regulations 105, Spencer Grant, surviving annuitant having been born on January 1, 1880, and being 67 years of age on March 2, 1947, the date of decedent's death.

Number of Policy	Company	Annuity Date	Amount of Annuity	Value per Dollar of Annuity	Value of Policy
56921	Connecticut General Life	Mar. 28	\$2,629.00	\$8.14979	\$ 21,425.80
13523	Connecticut Mutual Life	Apr. 1	1,314.25	8.13635	10,693.20
2296	Metropolitan Life	Apr. 1	328.18	8.13635	2,670.19
2297	Metropolitan Life	Apr. 1	984.54	8.13635	8,010.57
972085	Pacific Mutual Life	July 1	1,428.32	7.88366	11,260.39
A121202	Sun Life of Canada	July 1	2,631.58	7.88366	20,746.48
AN18809	Aetna Life	Oct. 1	1,973.40	7.63366	15,064.26
AN18810	Aetna Life	Oct. 1	657.80	7.63366	5,021.42
A21422	Provident Life	Oct. 1	1,313.00	7.63366	10,023.00
A22937	Provident Life	Dec. 31	1,338.25	7.38366	9,881.18
987534	Pacific Mutual Life	Dec. 31	803.23	7.38366	5,930.78
A172793	Sun Life of Canada	Dec. 31		7.38366	19,784.74
2111175	Travelers Insurance Co.	Dec. 31	1,346.72	7.38366	9,943.72
2109941	Travelers Insurance Co.	Dec. 31	1,346.72	7.38366	9,943.72

Total value\$160,399.45

Note: For basis of valuations of annuities, see annexed letter from Coates and Herfurth, independent actuaries, San Francisco, California.

Joint Exhibit No. 15—(Continued)

Grant Estate

Present Value of Annual Payments of \$1.00 for Life. Age 67. Combined Experience Table and 4% Interest.

Date of First Payment	Value as of March 2, 1947
March 28, 1947.....	\$8.14979
April 1, 1947.....	8.13635
July 1, 1947.....	7.88366
October 1, 1947.....	7.63366
December 31, 1947	7.38366
March 2, 1948.....	7.21699

“Present Value” may be defined as the sum of money which, if deposited in a bank, would be just sufficient to provide annual payments for life, provided that interest is credited each year on the balance of the account at the rate shown, and provided that mortality is in accordance with the Table of Mortality used.

I certify that the above figures are the present values as of March 2, 1947, of an annual payment of \$1.00 for the lifetime of a person aged 67, the first payment being made on the date indicated, based on interest at 4% per annum and the Combined Experience Table of Mortality. I also certify that, according to the Combined Experience Table of Mortality, the Expectation of Life for a person aged 67 is 9.96 years.

COATES and HERFURTH,
Consulting Actuaries,

By /s/ G. FRANK WAITES.

San Francisco, California, May 10, 1948.

Coates and Herfurth, Consulting Actuaries

Joint Exhibit No. 15—(Continued)

Form 712

Treasury Department

Internal Revenue Service

Life Insurance Statement

(To be filed by Executor with Federal Estate Tax
Return, Form 706)

Name of Insurance Company: Aetna Life Insurance
Company, Hartford, Conn.

Name of decedent (annuitant): Blanche K. Grant.

Date of death: March 2, 1947.

Number of policy: AN-18810 (other annuitant
Spencer Grant).

Date of issue: Jan. 1, 1939.

Kind of policy: Joint & Survivor Life Annuity of
\$657.80.

Amount of premium: \$11,984.05 Single.

Names(s) of beneficiary(ies): Annually, beginning
10-1-40, payable to said Blanche K. Grant or
said Spencer Grant, provided that no annuity
payments shall be made to either annuitant who
is deceased.

Face amount of policy:

Amount of accumulated dividends:

Amount of post mortem dividends:

Principal of any indebtedness to the company de-
ductible in determining the net proceeds:

Interest on the foregoing amount accrued to the date
of death:

Amount of proceeds (if payable in one sum):

Joint Exhibit No. 15—(Continued)

Value of proceeds as of the date of death (if not payable in one sum): \$8,045.16 (Basis—cost of new contract).

Provisions of policy with respect to the deferred payments or to the installments (attach additional sheet if necessary):

Amount of installments:

Date of birth of any person the duration of whose life may measure the number of payments:

Amount applied by the insurance company as a single premium representing the purchase of the installment benefits:

Basis (mortality table and rate of interest) used by the insurer in valuing the installment benefits:

Was the insured the annuitant or beneficiary of any annuity contract issued by the company? AN-18809.

State names of companies with which decedent carried other policies and the amount of such policies, if this information is disclosed by your records: No record.

The undersigned officer of the above-named insurance company hereby certifies that this statement sets forth correct and true information.

L. O. KINNE,

Assistant Secretary;

By /s/ E. F. BASSFORD.

(Date of certification): March 25, 1947.

Joint Exhibit No. 15—(Continued)

Form 712

Treasury Department

Internal Revenue Service

Life Insurance Statement

(To be filed by Executor with Federal Estate Tax
Return, Form 706)

Name of Insurance Company: Aetna Life Insurance
Company, Hartford, Conn.

Name of decedent (annuitant): Blanche K. Grant.

Date of death: March 2, 1947.

Number of policy: AN-18809 (other annuitant
Spencer Grant).

Date of issue: Jan. 1, 1939.

Kind of policy: Joint & Survivor Life Annuity of
\$1,973.40.

Amount of premium: \$38,015.95 Single.

Name(s) of beneficiary(ies): Annually, beginning
10-1-39, payable to said Blanche K. Grant or said
Spencer Grant, provided that no annuity pay-
ments should be made to either annuitant who is
deceased.

Face amount of policy:

Amount of accumulated dividends:

Amount of post mortem dividends:

Principal of any indebtedness to the company de-
ductible in determining the net proceeds:

Interest on the foregoing amount accrued to the
date of death:

Amount of proceeds (if payable in one sum):

Value of proceeds as of the date of death (if not

Joint Exhibit No. 15—(Continued)

payable in one sum): \$24,137.47 (Basis—cost of new contract).

Provisions of policy with respect to the deferred payments or to the installments (attach additional sheet if necessary):

Amount of installments:

Date of birth of any person the duration of whose life may measure the number of payments:

Amount applied by the insurance company as a single premium representing the purchase of the installment benefits:

Basis (mortality table and rate of interest) used by the insurer in valuing the installment benefits:

Was the insured the annuitant or beneficiary of any annuity contract issued by the company? AN-18810.

State names of companies with which decedent carried other policies and the amount of such policies, if this information is disclosed by your records: No record.

The undersigned officer of the above-named insurance company hereby certifies that this statement sets forth correct and true information.

L. O. KINNE,

Assistant Secretary;

By /s/ E. F. BASSFORD.

(Date of certification): March 25, 1947.

Joint Exhibit No. 15—(Continued)

Form 712

Treasury Department

Internal Revenue Service

Life Insurance Statement

(To be filed by Executor with Federal Estate Tax
Return, Form 706)

Name of Insurance Company: Connecticut General
Life Insurance Company.

Name of decedent (insured): Blanche K. Grant.

Date of death: 3-2-47.

Number of policy: A-56921.

Date of issue: 12-28-38.

Kind of policy: Single Premium Longer Life An-
nuity.

Amount of premium: \$50,000.00.

Name(s) of beneficiary(ies): Spencer Grant.

Face amount of policy: None.

Amount of accumulated dividends:

Amount of post mortem dividends:

Principal of any indebtedness to the company de-
ductible in determining the net proceeds:

Interest on the foregoing amount accrued to the
date of death:

Amount of proceeds (if not payable in one sum):

Value of proceeds as of the date of death (if not
payable in one sum): \$33,583.11.

Provisions of policy with respect to the deferred
payments or to the installments (attach ad-

Joint Exhibit No. 15—(Continued)

ditional sheet if necessary): A life income of \$2,629.00 per annum to Spencer Grant.

Amount of installments:

Date of birth of any person the duration of whose life may measure the number of payments: January 1, 1880.

Amount applied by the insurance company as a single premium representing the purchase of the installment benefits.

Basis (mortality table and rate of interest) used by the insurer in valuing the installment benefits: Modified Standard Annuity 2%.

Was the insured the annuitant or beneficiary of any annuity contract issued by the company? Yes—as above.

State names of companies with which decedent carried other policies and the amount of such policies, if this information is disclosed by your records:

The undersigned officer of the above-named insurance company hereby certifies that this statement sets forth correct and true information.

/s/ ROBERT K. WOLF,
Secretary.

(Date of certification): April 15, 1947.

Joint Exhibit No. 15—(Continued)

Form 712

Treasury Department

Internal Revenue Service

Life Insurance Statement

(To be filed by Executor with Federal Estate Tax
Return, Form 706)

Name of Insurance Company: Sun Life Assurance
Company of Canada, Montreal, Canada.

Name of decedent payee: Mrs. Blanche Kelleher
Grant.

Date of death: March 2, 1947.

Number of policy: A122793.

Date of issue: Nov. 13, 1939.

Kind of policy: Joint Life and Last Survivorship
Annuity.

Amount of premium: Single \$50,000.00.

Name(s) of beneficiary(ies): Co-Annuitant—Spencer Grant.

Face amount of policy:

Amount of accumulated dividends:

Amount of post mortem dividends:

Principal of any indebtedness to the company deductible in determining the net proceeds:

Interest on the foregoing amount accrued to the date of death:

Amount of proceeds (if payable in one sum):

Value of proceeds as of the date of death (if not payable in one sum): \$32,070.82.

Provisions of policy with respect to the deferred payments or to the installments (at-

Joint Exhibit No. 15—(Continued)

tach additional sheet if necessary): Annual instalments of \$2,679.53 continue payable to the surviving Annuitant—Spencer Grant—during his lifetime only.

Amount of installments: \$2,679.53 Annually.

Date of birth of any person the duration of whose life may measure the number of payments: Spencer Grant—Born January 1, 1880.

Amount applied by the insurance company as a single premium representing the purchase of the installment benefits:

Basis (mortality table and rate of interest) used by the insurer in valuing the installment benefits: Current manual rates.

Was the payee the annuitant or beneficiary of any other annuity contract issued by the company? A-121202.

State names of companies with which decedent carried other policies and the amount of such policies, if this information is disclosed by your records:

The undersigned officer of the above-named insurance company hereby certifies that to the best of his knowledge & belief this statement sets forth correct and true information

/s/ E. L. EARL,

Associate Secretary.

(Date of certification): April 2, 1947.

Joint Exhibit No. 15—(Continued)

Form 712

Treasury Department

Internal Revenue Service

Life Insurance Statement

(To be filed by Executor with Federal Estate Tax
Return, Form 706)

Name of Insurance Company: Sun Life Assurance
Company of Canada, Montreal, Canada.

Name of decedent payee: Mrs. Blanche Kelleher
Grant.

Date of death: March 2, 1947.

Number of policy: A121202.

Date of issue: Jan. 1, 1939.

Kind of policy: Joint Life and Last Survivorship
Annuity.

Amount of premium: Single \$50,000.00.

Name(s) of beneficiary(ies): Co-Annuitant—Spencer Grant.

Face amount of policy:

Amount of accumulated dividends:

Amount of post mortem dividends:

Principal of any indebtedness to the company deductible in determining the net proceeds:

Interest on the foregoing amount accrued to the date of death:

Amount of proceeds (if payable in one sum):

Value of proceeds as of the date of death (if not payable in one sum): \$32,894.75.

Provisions of policy with respect to the deferred payments or to the installments (attach ad-

Joint Exhibit No. 15—(Continued)

ditional sheet if necessary): Annual installments of \$2,631.58 continue payable to the surviving annuitant—Spencer Grant—during his lifetime only.

Amount of installments: \$2,631.58.

Date of birth of any person the duration of whose life may measure the number of payments: Spencer Grant—Born Jan. 1, 1880.

Amount applied by the insurance company as a single premium representing the purchase of the installment benefits:

Basis (mortality table and rate of interest) used by the insurer in valuing the installment benefits: Current manual rates.

Was the payee the annuitant or beneficiary of any other annuity contract issued by the company? A-122793.

State names of companies with which decedent carried other policies and the amount of such policies, if this information is disclosed by your records:

The undersigned officer of the above-named insurance company hereby certifies that to the best of his knowledge & belief this statement sets forth correct and true information.

/s/ E. L. EARL,

Associate Secretary.

(Date of certification): April 2, 1947.

Joint Exhibit No. 15—(Continued)

Pacific Mutual Life Insurance Company
Home Office Los Angeles, California
A. N. Kemp, Chairman of the Board
Asa V. Call, President

Los Angeles 55, California

March 20, 1947.

#972085, 987534

Mr. J. Wm. Klein, Accountant for Spencer Grant,
c/o Grant—Birkholm & Co., Inc.,
206 Sansome Street,
San Francisco 4, California.

Dear Mr. Klein:

Responding to your letter of March 12 to our Agency Office in Oakland, we are furnishing the following information:

We should be furnished with a certified copy of the Death Certificate, which will furnish proof of Mrs. Grant's death.

On March 2, 1947, this Company would have sold a Life Annuity to a man born January 1, 1880, which would pay him \$1,428.32 on July 1, 1947, and a like payment on July 1 of each year thereafter, provided such purchaser were alive on each of the payment due dates. The premium for this would have been \$17,746.00. Your letter gave Mr. Grant's

Joint Exhibit No. 15—(Continued)

birth date as January 1, 1881, but our records show the year to have been 1880.

A broker handling the business would have been paid a commission of $2\frac{1}{2}\%$, or \$443.65.

While you did not ask for the same information with reference to the other contract (#987534) you are informed as follows, with regard to it:

On March 2, 1947, this Company would have sold a Life Annuity to a man born January 1, 1880, which would pay him \$803.23 on December 31, 1947, and annually thereafter provided, as above, that such purchaser were alive on each of the payment due dates, for a premium of \$9,562.00. A broker's commission would have been \$239.05.

We are sending this letter in triplicate, and through Mr. Dreyer's office, for delivery to you.

Very truly yours,

/s/ LESLIE J. COOPER.

LJC:law

Joint Exhibit No. 15—(Continued)

Metropolitan Life Insurance Company
Frederick H. Ecker, Chairman of the Board
Leroy A. Lincoln, President

Pacific Coast Head Office:
600 Stockton Street,
San Francisco 20, California.

March 28, 1947.

Bene & Ann TW

Grant-Birkholm & Conmany, Inc.,
Insurance Brokers,
206 Sansome Street,
San Francisco 4, California.

Attention J. William Klein, Accountant:
Subject: Annuity Contract 2296-AB-2.

Gentlemen:

This is in reply to your letters of March 12 and 18, in reference to Annuity Contract 2296-AB-2. You have asked.

“1. The cost as of March 2, 1947, of an annuity policy in favor of Mr. Grant, who was born on January 1, 1880, providing for the payment to him of the sum of \$328.18 per year on April 1, without any provision for the refund of the unpaid portion of the cost of the annuity.”

The cost would be \$4,393.81.

Joint Exhibit No. 15—(Continued)

“2. The amount of the commission customarily paid by you to the broker for the placing of the policy at the cost set forth in answer to question 1 above.”

The Commission would be either $2\frac{1}{4}\%$ or $2\frac{1}{2}\%$ depending upon the contract with the Agent writing the Annuity.

Yours truly,

/s/ R. W. HODGSON,

Supervisor Issue Division.

Metropolitan Life Insurance Company
Frederick H. Ecker, Chairman of the Board
Leroy A. Lincoln, President

Pacific Coast Head Office:

600 Stockton Street,
San Francisco 20, California.

March 28, 1947.

Bene & Ann TW

Grant-Birkholm & Company, Inc.,
Insurance Brokers,
206 Sansome Street,
San Francisco 4, California.

Attention J. William Klein, Accountant:

Subject: Annuity Contract 2297-AB-2.

Gentlemen:

This is in reply to your letters of March 12 and

Joint Exhibit No. 15—(Continued)

March 18, in reference to Annuity Contract 2297-AB-2.

You have asked:

“1. The cost as of March 2, 1947, of an annuity policy in favor of Mr. Grant, who was born on January 1, 1880, providing for the payment to him of the sum of \$984.54 per year on April 1 without any provision for the refund of the unpaid portion of the cost of the annuity.”

The Cost would be \$13,181.42.

“2. The amount of the commission customarily paid by you to the broker for the placing of the policy at the cost set forth in answer to question 1 above.”

The commission would be either $21\frac{1}{4}\%$ or $21\frac{1}{2}\%$ depending upon the contract with the Agent writing the Annuity.

Yours truly,

/s/ R. W. HODGSON,
Supervisor Issue Division.

Joint Exhibit No. 15—(Continued)

The Connecticut Mutual Life Insurance Company
Hartford

1404 Franklin Street,
Oakland 12, Calif.

March 21, 1947.

Mr. J. William Klein,
Accountant for Spencer Grant,
Grant-Birkholm & Co., Inc.,
206 Sansome Street,
San Francisco 4, California.

Dear Mr. Klein:

Further to our letter of March 14, we have now received information from our Home Office, that the sum of \$16,780.74 would be the single premium required for an annuity without refund if purchased as of March 2, 1947, by a man born January 1, 1880, with a first payment of \$1,314.25 on April 1, 1947, and annually thereafter.

If we can be of further service in this matter, please let us know.

Yours very truly,

/s/ JAMES L. TAYLOR,
General Agent.

JLT:CH

P. S. We are enclosing a form to be completed by Mr. Grant, and we will also require consent to pay from the State Controller Inheritance Tax Department before continuing the annuity payments.

Joint Exhibit No. 15—(Continued)

The Prudential Insurance Company of America
Home Office, Newark, N. J.

Herrick C. Brown, C.L.U., Manager
Oakland Ordinary Agency

16th Street and Telegraph Avenue,
Oakland, Calif.

July 19, 1947.

Mr. Edgar T. Zook,
Attorney for Spencer Grant, Executor,
1101 Alaska Commercial Building,
San Francisco 4, California.

In re: Policy A21422 & A22937
Spencer & Blanche K. Grant.

Dear Mr. Zook:

Our Home Office has adjusted their records so that future checks will be drawn to the order of Spencer Grant.

It is a regulation of the United States Treasury Department that forms 712 are to be completed only in connection with actual life insurance policies, therefore they will not be furnished, but the following information is what you desire:

Annuities A-21422 and A-22937 are Last Survivor Annuity contracts, which were issued on January 3, 1939, and Nov. 13, 1939, respectively, to Spencer Grant and Blanche Kelleher Grant for a purchase price of \$25,000 each. Annuity contracts A-21422 provided for a pro rata payment of \$984.75 on Oct. 1, 1939, with subsequent payments to be made annually in the amount of \$1,313.00 on October

Joint Exhibit No. 15—(Continued)

1 of each year during the lifetime of the annuitants. Annuity contract A-22937 provided for a pro rata payment of \$175.51 on Dec. 31, 1939, with subsequent payments to be made annually in the amount of \$1,338.25 on Dec. 31 of each year during the lifetime of the annuitant. Such checks representing the payments under both contracts were drawn to the order of Spencer Grant or Blanche Kelleher Grant. Both contracts further provide that at the death of one of the annuitants payments will continue to the survivor as long as he or she shall live.

Since Mrs. Grant died on March 2, 1947, the value of the income payable to Mr. Grant would be considered equivalent to the cost to buy Life Annuities providing him similar incomes. Thus, on the basis of the 1937 Standard Annuitant's Table of Mortality with two per cent interest, an amount of \$16,110.85, as of 3-2-47, would provide a lifetime income of \$1,338.25 annually to a man aged 67, starting with a payment due Dec. 31, 1947. This would be comparable to the income being received under contract A-22937. Similarly, an amount of \$16,156.97 would provide a lifetime income of \$1313 annually (the same as being received under contract A-21422), to a man aged 67, with the first payment due Oct. 1, 1947.

We trust the above is the information you desire.

Very truly yours,

/s/ V. L. HEFFERNAN,
Office Supervisor.

VH

Joint Exhibit No. 15—(Continued)

The Travelers Insurance Company
Hartford 15, Connecticut
Branch Office

• Branch Office,
508 Sixteenth Street,
Oakland 12, Calif.

May 6, 1947.

Slack, Zook and Edwards,
1101 Alaska Commercial Building,
San Francisco 4, California.

Att: Mr. Edgar T. Zook, Attorney for Spencer
Grant, Executor.

Re: Spencer Grant and Blanche Kelleher
Grant, Annuity Contract 2109941-2111175.

Gentlemen:

Your letter of April 7, 1947, was furnished our Home Office for their attention. They now advise it is not the Company's practice to complete Treasury Department Estate Tax Form 712 with regard to annuity contracts for not only does the form not appear applicable, but we are uncertain of the correct valuation to be used in the event it is determined a tax liability exists.

We assume you are familiar with the captioned contract, both of which were issued under date of November 13, 1939, on our joint and survivor annuity form in consideration of single premiums of \$25,000 on the lives of Spencer Grant and Blanche Kelleher Grant. Each contract was to provide an

Joint Exhibit No. 15—(Continued)

annual income of \$1,346.72 during the joint lifetime of these annuitants and for a continuation of the same payments to the survivor. As a result of the death of Mrs. Grant on March 2, 1947, payments are to continue to Spencer Grant for the remainder of his lifetime.

May we suggest that you discuss this matter with the proper tax authorities and the following valuations may be of use in such a discussion:

1—On the basis of Table A of the Federal Estate Tax Regulations, the value as of March 2, 1947, to a male age 67, of a Life Annuity of \$1,346.72 annually, first payment due December 31, 1947, is \$9,944.33 for each contract.

2—On the basis of this Company's annuity rates then in effect, the cost as of March 2, 1947, of a Life Annuity of \$1,346.72 annually, first payment due December 31, 1947, to a male age 67 2/12 years is \$16,226.90 for each contract.

It may be held that there is nothing taxable at the first death or it may be that there is a tax liability based on the full amount or on one-half the amount of the annuity income. This is something for the proper tax authorities to determine.

Very truly yours,

/s/ M. A. BROGNARD,
Assistant Cashier.

MAB:EM

PLAINTIFF'S EXHIBIT No. 17
(Filed March 26, 1954)

Aetna Life Insurance Company
Hartford 15, Connecticut

December 8, 1953.

Mr. Henry V. Colby,
McKeon and Colby,
310 Sansome Street,
San Francisco 4, California.

Dear Mr. Colby:

Re: Annuity Contracts AN 18809 and 18810
Blanche K. Grant and Spencer Grant.

Contract AN 18809 provides for an annuity of \$1,-973.40 payable on October 1st of each year and Contract AN 18810 provides for an annuity of \$657.80 also payable on October 1st of each year. Both contracts are single premium non-participating and non-refundable joint and survivorship annuity contracts.

On March 2, 1947, we would have charged a female purchaser or nominator born January 26, 1881, the gross premiums hereinafter specified for her purchase from us of single premium non-participating and non-refundable survivorship annuity contracts (as distinguished from joint and survivorship annuity contracts) providing for annuities of the same amounts and payable annually on the same dates as under the Grant contracts with payments to be made to a male annuitant born January 1, 1880, such payments to commence if and when he should survive the female and to continue thereafter for the rest of his life.

Plaintiff's Exhibit No. 17—(Continued)

Premium of \$7,437.74 for annuity of \$1,973.40.

Premium of \$2,479.25 for annuity of \$657.80.

The above quoted premiums are based on our 1947 annuity rates as follows:

(1) Table of mortality used—1937 Standard Annuity Male Table, with the age of the purchaser adjusted by adding three years and the age of the annuitant adjusted by subtracting one year.

(2) Rate of interest—3%.

(3) Loading charge—10.885% of net premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have issued such a contract to her on that date.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for single life annuity contracts issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contracts.

Yours very truly,

/s/ RALPH KEFFER,

Actuary.

Ralph Keffer

MEB

[Stamped]: Received Dec. 10, 1953.

Plaintiff's Exhibit No. 17—(Continued)

Connecticut General
Life Insurance Company
Hartford 15, Connecticut

December 9, 1953.

Air Mail

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, California.

Annuity 56921—Blanche K. and Spencer
Grant.

Dear Mr. Colby:

Contract 56921 provides for an annuity of \$2,629 payable on March 28 of each year. It is a single premium nonparticipating and nonrefundable joint and survivorship annuity contract.

On March 2, 1947, we would have charged a female purchaser or nominator born January 26, 1881, a gross premium of \$7,284.43 for her purchase from us of a single premium nonparticipating and nonrefundable survivorship annuity contract (as distinguished from a joint and survivorship annuity contract), providing for an annuity of the same amount and payable annually on the same date as under the Grant contract with payments to be made to a male annuitant born January 1, 1880; such payments to commence if and when he should survive the female and to continue thereafter for the rest

Plaintiff's Exhibit No. 17—(Continued)

of his life. The above quoted premium is based on our 1947 annuity rates, as follows:

- (1) Table of Mortality used—1937 Standard Annuity Table with one year set-back in age.
- (2) Rate of interest—2%.
- (3) Loading charge— $6\frac{1}{2}\%$ of gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have issued such a contract to her on that date.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for a single life annuity contract issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contract.

Yours very truly,

/s/ WARD VAN B. HART,
Associate Actuary.

WVBH:ABS

[Stamped]: Received Dec. 10, 1953.

Plaintiff's Exhibit No. 17—(Continued)

Metropolitan Life Insurance Company
One Madison Avenue, New York 10, N. Y.

December 9, 1953.

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, Calif.

Re: Annuity Contracts 2296-AB2 and 2297-AB2
Blanche K. Grant and Spencer Grant.

Dear Mr. Colby:

Contract 2296-AB2 provides for an annuity of \$328.18 payable on April 1st of each year and Contract 2297-AB2 provides for an annuity of \$984.54 also payable on April 1st of each year. Both contracts are single premium non-participating and non-refundable joint and survivorship annuity contracts.

On the same basis of mortality, interest and loading as used for such joint and survivorship annuity contracts in 1947, the gross premiums would have been as hereinafter specified to a female purchaser or nominator born January 26, 1881, for her purchase from us on March 2, 1947, of single premium non-participating and non-refundable survivorship annuity contracts (as distinguished from joint and survivorship annuity contracts) providing for annuities of the same amounts and payable annually on the same dates as under the Grant contracts with payments to be made to a male annuitant born Janu-

Plaintiff's Exhibit No. 17—(Continued)

ary 1, 1880, such payments to commence if and when he should survive the female and to continue thereafter for the rest of his life:

Premium of \$894.44 for annuity of \$328.18.

Premium of \$2,683.31 for annuity of \$984.54.

The above-quoted premiums are based on our 1947 annuity rates as follows:

(1) Table of mortality used—1937 Standard Annuity Table with three-year setback in age.

(2) Rate of interest $2\frac{1}{4}\%$.

(3) Loading charge—6% of gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have sold such a contract to her on that date.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for single life annuity contracts issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contracts.

Yours very truly,

/s/ T. A. CROWTHER,
Assistant Actuary.

[Stamped]: Received Dec. 11, 1953.

Plaintiff's Exhibit No. 17—(Continued)

The Head Office of the
Sun Life Assurance Company of Canada
Montreal

December 9, 1953.

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, California.

Dear Mr. Colby:

Re: Policies Nos. A121,202—A122,793—
Spencer Grant.

Contract A.121,202 provides for an annuity of \$2,631.58 payable on July 1st of each year, and Contract A.122,793 provides for an annuity of \$2,679.53 payable on December 31st of each year. Both contracts are single premium non-participating and non-refundable joint and survivorship annuity contracts.

On March 2, 1947, we would have charged a female purchaser or nominator born January 26, 1881, the gross premiums hereinafter specified for her purchase from us of single premium non-participating and non-refundable survivorship annuity contracts (as distinguished from joint and survivorship annuity contracts) providing for annuities of the same amounts and payable annually on the same dates as under the Grant contracts with payments to be made to a male annuitant born January 1, 1880, such payments to commence if and when he should survive the female and to continue thereafter for the rest of his life:

Plaintiff's Exhibit No. 17—(Continued)

Premium of \$7,947.37 for annuity of \$2,631.58.

Premium of \$8,092.18 for annuity of \$2,679.53.

The above-quoted premiums are based on our 1947 annuity rates as follows:

(1) Table of mortality used:

Assured life—British Offices Life Table Om (5).

Annuitant life—British Offices Annuity Table O(am).

(2) Rate of interest— $3\frac{1}{2}\%$.

(3) Loading charge—10% of net premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have sold such a contract to her on that date.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for single life annuity contracts issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contracts.

Yours very truly,

/s/ S. M. BAILEY,

Mathematician.

MB/AV

[Stamped]: Received Dec. 15, 1953.

Plaintiff's Exhibit No. 17—(Continued)

Pacific Mutual Life Insurance Company
Home Office Los Angeles, California
A. N. Kemp, Chairman of the Board
Asa V. Call, President

December 16, 1953.

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, California.

Annuity Contracts 972085 and 987534 Blanche
K. Grant and Spencer Grant.

Dear Mr. Colby:

Contract 972085 provides for an annuity of \$1,428.32 payable on July 1st of each year and Contract 987534 provides for an annuity of \$803.23 payable on December 31st of each year. Both contracts are single premium non-participating and non-refundable joint and survivorship annuity contracts.

On March 2, 1947, we would have charged a female purchaser or nominator born January 26, 1881, the gross premiums hereinafter specified for her purchase from us of single premium non-participating and non-refundable survivorship annuity contracts (as distinguished from joint and survivorship annuity contracts) providing for annuities of the same amounts and payable annually on the same dates as under the Grant contracts with payments to be made **to a male annuitant** born January 1, 1880, such payments to commence if and when he should survive

Plaintiff's Exhibit No. 17—(Continued)

the female and to continue thereafter for the rest of his life:

Premium of \$3,910.60 for annuity of \$1,428.32.

Premium of \$2,199.16 for annuity of \$803.23.

The above-quoted premiums are based on our 1947 annuity rates as follows:

(1) Table of mortality used—1937 Standard Annuity Table with one year setback in age.

(2) Rate of Interest—2%.

(3) Loading charge—6½% of gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have issued such a contract to her on that date.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for single life annuity contracts issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contracts.

Yours very truly,

/s/ LESLIE J. COOPER,
Associate Actuary.

[Stamped]: Received Dec. 18, 1953.

Plaintiff's Exhibit No. 17—(Continued)

The Connecticut Mutual Life Insurance Company
Hartford

Airmail.

December 18, 1953.

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, California.

Single Premium Annuity No. 13523 Blanche
K. Grant, Deceased.

Dear Mr. Colby:

Contract 13523 provides for an annuity of \$1,314.25 payable on April 1 of each year. It is a single premium non-participating and non-refundable joint and survivorship annuity contract.

On March 2, 1947, we would have charged a female purchaser or nominator born January 26, 1881, a gross premium of \$3,600 for her purchase from us of a single premium non-participating and non-refundable survivorship annuity contract (as distinguished from a joint and survivorship annuity contract) providing for an annuity of the same amount and payable annually on the same date as under the Grant contract with payments to be made to a male annuitant born January 1, 1880, such payments to commence if and when he should survive the female and to continue thereafter for the rest of his life. The above-quoted premium is based on our 1947 annuity rates as follows:

Plaintiff's Exhibit No. 17—(Continued)

(1) Table of mortality used—1938 Standard Annuity Table with one year setback in age.

(2) Rate of interest—2%.

(3) Loading charge—6½% of gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have issued such a contract to her on that date.

We have previously furnished you with the amount of the gross premium we would have charged on March 2, 1947, for a single life annuity contract issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contract.

Sincerely,

/s/ R. H. HARTLEY, JR.,

Assistant Manager Annuity
Department.

RHH:alb

[Stamped]: Received Dec. 21, 1953.

Plaintiff's Exhibit No. 17—(Continued)

The Prudential Insurance Company of America
Western Home Office, Los Angeles 54, Calif.

December 31, 1953.

Mr. Henry V. Colby,
McKeon & Colby,
310 Sansome Street,
San Francisco 4, California.

Annuity Contracts A-21422 and A-22937 Grant
Insurance.

Dear Mr. Colby:

Contract A-21422 provides for an annuity of \$1,313.00 payable on October 1st of each year and Contract A-22937 provides for an annuity of \$1,-338.25 payable on December 31st of each year. Both contracts are single premium non-participating and non-refundable joint and survivorship annuity contracts.

You have asked that we furnish you with the amount we would have charged on March 2, 1947, for an annual reversionary annuity to commence on the October 1st following the death of a female born January 26, 1881, and to continue thereafter during the life of a male born January 1, 1880. The amount of annual annuity was to be \$1,313.00. We did not offer this type of annuity for sale on March 2, 1947, but using the same rate basis as we were using for other annuities offered for sale on that date, the approximate cost of such an annuity would have been \$3,624.

You have also asked that we furnish you with the

Plaintiff's Exhibit No. 17—(Continued)

amount we would have charged on March 2, 1947, for an annual reversionary annuity to commence on the December 31st following the death of a female born January 26, 1881, and to continue thereafter during the life of a male born January 1, 1880. The amount of annual annuity was to be \$1,338.25. For the reasons given above we can only give an approximate cost and this would have been \$3,694.

Our annuity rates in effect on March 2, 1947, were based on the 1937 Standard Annuity table with one-year setback in age for males and six years for females, 2% interest and a loading of 61½% of the gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. In particular, since the annuity payment would not commence until she died, the female would have to pass a satisfactory medical examination in order to have such a contract issued.

We have previously furnished you with the amount of the gross premiums we would have charged on March 2, 1947, for single life annuity contracts issued to a male purchaser born January 1, 1880, and providing for the same annuities payable annually to him on the same dates as under the Grant contracts.

Very truly yours,

/s/ HAROLD G. PAFF,
Actuarial Director.

[Stamped]: Received Jan. 2, 1954.

Plaintiff's Exhibit No. 17—(Continued)

The Prudential Insurance Company of America
Western Home Office, Los Angeles 54, Calif.

January 8, 1954.

Mr. Henry V. Colby,
McKeon and Colby,
310 Sansome Street,
San Francisco 4, California.

Dear Mr. Colby:

In my letter of December 31, 1953, costs of reversionary annuities were quoted. This will advise that such annuities are sometimes called "survivorship" annuities although standard textbooks on this subject use the term "reversionary" to describe such annuities.

Very truly yours,

/s/ HAROLD G. PAFF,
Actuarial Director.

[Stamped]: Received Jan. 11, 1954.

Plaintiff's Exhibit No. 17—(Continued)

The Travelers

The Travelers Insurance Company
Hartford 15, Connecticut

Airmail.

January 18, 1954.

Mr. Henry V. Colby,
McKeon and Colby,
310 Sansome Street,
San Francisco 4, California.

Dear Mr. Colby:

Blanche K. Grant and Spencer Grant, Joint
and Survivor Annuity Contracts 2109941
and 2111175 (Grant vs. Smyth).

Both of these contracts provide for an annuity of \$1,346.72 payable on December 31 of each year and are Single Premium, Non-Participating, and Non-Refundable Joint and Survivor Annuity contracts.

You have asked us to furnish you with the amount we would have charged on March 2, 1947, for an annual reversionary annuity of \$1,346.72 to commence on December 31 following the death of a female born January 26, 1881, and to continue thereafter during the life of a male born January 1, 1880. We did not offer this type of annuity for sale on March 2, 1947. However, using the same rate basis as we were using for other annuities offered for sale on that date, the cost of such an annuity would have been \$3,710.42. Reversionary annuities are some-

Plaintiff's Exhibit No. 17—(Continued)

times called "survivorship" annuities, although standard textbooks on this subject use, and we prefer the term "reversionary" to describe them.

Our annuity rates in effect on March 2, 1947, were based on the 1947 standard annuity table, with one-year setback in age, 2% interest, and a loading of $6\frac{1}{2}\%$ of the gross premium.

It is assumed that the female and the male would have satisfied the necessary conditions of insurability. On March 2, 1947, the date of Mrs. Grant's death, she would not have satisfied those conditions on account of the critical state of her health and we would not have issued such a contract to her on that date.

We have previously furnished you with the amount of the gross premium we would have charged on March 2, 1947, for a single Life Annuity contract issued to a male purchaser born January 1, 1880, and providing for the same annuity payable to him annually on the same date as under the Grant contracts.

Yours very truly,

/s/ J. E. JOHNSON,

Matured Contract Supervisor.

[Stamped]: Received Jan. 20, 1954.

[Endorsed]: No. 14,549. United States Court of Appeals for the Ninth Circuit. Spencer Grant, Executor of the Last Will and Testament of Blanche Kelleher Grant, Deceased, Appellant and Appellee, vs. James G. Smyth, Former Collector of Internal Revenue, Appellee and Appellant. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 14, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits listed below are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Complaint.

Answer.

Stipulation of facts.

Stipulation waiving jury.

Opinion.

Judgment.

Notice of appeal by plaintiff.

Cost bond on appeal.

Notice of appeal by defendant.

Stipulation designating contents of record on appeal.

Joint exhibits 1 thru 16, inclusive.

Plaintiff's exhibit 17.

Reporter's transcript of trial, Mar. 26, 1954.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of October, 1954.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,549

JAMES G. SMYTH, Former Collector of Internal
Revenue,

Appellant-Defendant,

vs.

SPENCER GRANT, Executor of the Last Will
and Testament of BLANCHE KELLEHER
GRANT, Deceased,

Appellee-Plaintiff.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD TO BE
PRINTED

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant-defendant James G. Smyth states the following point to be relied upon on appeal:

That the trial court erred in determining that the value of the annuity contracts in question, on the date of the decedent's death, which is includible in the value of her gross estate for estate tax purposes under Section 811(c)(1)(B) Internal Revenue Code (1939), was \$160,399, as reported in the estate tax return, and not \$257,117.20, as determined by the Commissioner of Internal Revenue.

Appellant-defendant James G. Smyth designates the following portion of the record to be printed:

1. Volume I of certified transcript of record.
2. Volume II of certified transcript of record (reporter's transcript), print only that portion commencing with line 11, page 23, and ending with line 16, page 31.

3. Joint exhibit 15, print only the following:

Sheet I—Print only the lines appearing above the heading "General Instructions."

Schedule E—Sheet VIII.

Sheet A-54.

Sheet A-56.

Sheet A-58.

Sheet A-60.

Sheet A-62.

Sheet A-64.

Sheet A-65.

Sheet A-66.

Sheet A-67.

Sheet A-68.

Sheet A-69.

Sheet A-70.

4. This statement and designation.

LLOYD H. BURKE,

United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Appellant-Defendant.

[Copy served.]

[Endorsed]: Filed Oct. 18, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD TO BE
PRINTED

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, plaintiff-appellant Spencer Grant states the following points on which he intends to rely:

1. The joint and survivorship annuity contracts the subject of the action were excludable from the gross estate of Blanche Kelleher Grant, Deceased, under the Technical Changes Act of 1949 (63 Stat. 891) as a matter of law and the Court below erred in concluding that they were includable.

2. If the annuity contracts were includable in Mrs. Grant's gross estate they had a value of only \$60,980.72, this being the amount which it would have cost to purchase comparable survivorship contracts on the date of her death, and the Court below erred in determining that the annuity contracts had a value of \$160,399.45.

If either or both of the foregoing points are sustained, plaintiff-appellant Spencer Grant is entitled to judgment for the principal sum of \$29,397.68 instead of the sum of \$28,603.43 for which he recovered judgment below.

Plaintiff-appellant Spencer Grant designates the following portion of the record to be printed in ad-

dition to the portion designated by appellant-defendant James G. Smyth:

(1) The following portions of Joint Exhibits 1 through 14:

(a) The first page of each of Joint Exhibits 1, 2 and 3;

(b) Joint Exhibit 4; and

(c) The first page of each of Joint Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

(2) The tabulation and letter annexed to "Schedule E-Sheet VIII" of Joint Exhibit 15.

(3) The following portions of Plaintiff's Exhibit 17:

(a) Aetna Life Insurance Co. letter dated December 8, 1953, excluding the last three paragraphs thereof;

(b) Connecticut General Life Insurance Co. letter dated December 9, 1953, excluding the last two paragraphs thereof;

(c) Metropolitan Life Insurance Co. letter dated December 9, 1953, excluding the last three paragraphs thereof;

(d) Sun Life Assurance Co. of Canada letter dated December 9, 1953, excluding the last three paragraphs thereof;

(e) Pacific Mutual Life Insurance Co. letter dated December 16, 1953, excluding the last three paragraphs thereof;

(f) Connecticut Mutual Life Insurance Co. letter dated December 18, 1953, excluding the last two paragraphs thereof;

(g) Prudential Insurance Co. of America letter dated December 31, 1953, excluding the last three paragraphs thereof;

(h) Prudential Insurance Co. of America letter dated January 8, 1954;

(i) The Travelers Insurance Co. letter dated January 18, 1954, excluding the last three paragraphs thereof;

(4) This statement and designation.

/s/ EDGAR T. ZOOK,

/s/ HENRY V. COLBY,

McKEON & COLBY,

Attorneys for Plaintiff-
Appellant.

Service and receipt of copy acknowledged.

[Endorsed]: Filed Oct. 22, 1954.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF RECORD
TO BE PRINTED

Defendant-Appellee, James G. Smyth, hereby designates to be printed as part of the record Plaintiff's Exhibit 17 in its entirety so that each letter in said Exhibit 17 designated by Plaintiff-Appellant to be printed will be printed in full.

Dated: October 22, 1954.

LLOYD H. BURKE,

United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
James G. Smyth.

Copy mailed.

[Endorsed]: Filed Oct. 22, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION IN REGARD TO EXHIBITS
NOT INCLUDED IN THE PRINTED
RECORD

It Is Hereby Stipulated by and between counsel for the respective parties in the above appeals that either party in either appeal may print as an appendix to its brief such portions of those exhibits which are not included in the printed record upon which such party intends to rely or, in lieu of such printing, may furnish the Court with four type-written copies of such portions of such exhibits.

Dated: October 19, 1954.

LLOYD H. BURKE,

United States Attorney;

By /s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
James G. Smyth.

/s/ HENRY V. COLBY,

Attorney for Spencer Grant.

[Endorsed]: Filed Oct. 22, 1954.

No. 14,549

IN THE
United States
Court of Appeals

For the Ninth Circuit

SPENCER GRANT, Executor of the Last Will
and Testament of Blanche Kelleher
Grant, Deceased,

Plaintiff-Appellant,

vs.

JAMES G. SMYTH, former Collector of
Internal Revenue,

Defendant-Appellee.

Brief for Plaintiff-Appellant

Appeal from the United States District Court for the Northern District
of California, Southern Division

EDGAR T. ZOOK
HENRY V. COLBY
McKEON & COLBY
310 Sansome Street
San Francisco 4, California

*Attorneys for
Plaintiff-Appellant*

FILED

JAN 21 1955

**PAUL P. O'BRIEN,
CLERK**



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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

SPENCER GRANT, Executor of the Last Will
and Testament of Blanche Kelleher
Grant, Deceased,

Plaintiff-Appellant,

vs.

JAMES G. SMYTH, former Collector of
Internal Revenue,

Defendant-Appellee.

**Brief for Plaintiff-Appellant
Spencer Grant**

Appeal from the United States District Court for the Northern District
of California, Southern Division

INTRODUCTION

Plaintiff and defendant both have appealed from the judgment (R. 48) of the District Court (O. D. Hamlin, Judge) directing that plaintiff as executor recover from defendant as former Collector the sum of \$28,603.43 on account of an overpayment of federal estate tax. The overpayment was made to satisfy a deficiency assessed by defendant

with respect to certain joint and survivorship annuity contracts which had been purchased by plaintiff's wife several years before her death. The opinion of the Court below is reported in 123 F. Supp. 771 (1954).

The issues presented below were whether the annuity contracts were properly includable in Mrs. Grant's gross estate at all and, if so, what was their value on the date of her death. The District Court determined that the contracts were includable (R. 39-42) and that they had a date of death value of \$160,399.45 (R. 42-47). Plaintiff appeals on the grounds that the contracts were not includable in Mrs. Grant's gross estate but that, if they were, they had a value of only \$60,980.72 (R. 146). Defendant on his cross-appeal contends that the contracts had a value of \$257,117.20 (R. 144).

JURISDICTION

As alleged in the complaint (R. 3) and admitted in the answer (R. 30), the action arises under an Act of Congress providing for Internal Revenue (1939 Code §11(c)).* The District Court had original jurisdiction under 28 U.S.C. 1340 and this Court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Facts

In 1938 and 1939, Mrs. Grant purchased fourteen joint and survivorship annuity contracts from various insurance companies for an aggregate consideration of \$390,000 (R. 38). The contracts obligated the insurance companies to pay annuities in the aggregate amount of \$20,744.52 to Mrs. Grant and plaintiff jointly each year until the death

*Code references in this brief are to the 1939 Internal Revenue Code.

of either and thereafter to the survivor each year until the death of the survivor (R. 38). We are concerned only with the survivorship provisions.

Mrs. Grant died on March 2, 1947 at the age of 66 (R. 34). Plaintiff, who then was 67 with a remaining life expectancy of 9.96 years (R. 35), survived and thereupon became entitled to the survivorship benefits under the contracts. As executor of Mrs. Grant's estate, he included the contracts in the estate tax return filed for her estate (R. 38). The aggregate returned value of \$160,399.45 was computed by use of the formula set forth in Section 81.10(i)(3) of Regulations 105 (R. 38) which, at that time, read as follows :

“(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday.”

The government asserted that the contracts should have been valued under Section 81.10(i)(2) of Regulations 105, which then read as follows :

“(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.”

In applying this so-called “comparable contract” rule of valuation, the government took the cost of “single life” contracts (\$257,117.20) instead of the cost of equivalent “sur-

vivorship" contracts (\$60,980.72) on the date of death as the measure of value of the Grant contracts.* Plaintiff paid the consequent deficiency assessment (R. 38), filed claim for refund which was not approved and then brought this action.

Three separate grounds for recovery were relied on below by plaintiff:

(1) The Grant contracts were not includable in Mrs. Grant's gross estate as a matter of law.

(2) If they were includable, their date of death value was \$60,980, this being the date of death cost of comparable or survivorship contracts.

(3) If survivorship contracts were not comparable, no comparable contracts were available and the Grant contracts had a value of \$160,399 determined in accordance with established actuarial principles.

The Court below rejected the first two of these contentions and found for plaintiff on the third. Plaintiff appeals in order to preserve his first two contentions.

Contentions

Plaintiff on this appeal maintains that the annuity contracts were not properly includable in Mrs. Grant's gross estate at all but that, if they were, their date of death value was \$60,980 instead of the \$160,399 determined by the Court below or the \$257,117 claimed by defendant on his cross-appeal.

*A "single life" contract requires the issuing company to commence payments forthwith to a designated single annuitant for life. A "survivorship" contract requires the issuing company to commence payments to a designated annuitant (called survivor-annuitant) only if and when he survives the purchaser. There being an element of contingency the cost of a survivorship annuity will necessarily be less than the cost of a single life annuity for the benefit of the same annuitant.

THE ANNUITY CONTRACTS WERE NOT INCLUDABLE IN MRS. GRANT'S GROSS ESTATE.

The contracts were excludable from Mrs. Grant's gross estate by reason of the retroactive operation of the Technical Changes Act of 1949 (63 Stat. 891) adopted after the estate tax return was filed for her estate. Section 7 of that Act retroactively exempted lifetime transfers intended to take effect in possession or enjoyment at or after the transferor's death where, as here, no reversionary interest was retained, the transferor died after February 10, 1939, and the transfer was made prior to October 8, 1949 (1939 Code 811(c) as amended by the Technical Changes Act). Mrs. Grant's purchase of the contracts (as to their survivorship provisions) was not also an includable lifetime transfer whereby she retained for life the possession or enjoyment of the property transferred (plaintiff's contingent survivorship interest) or the income therefrom.

The Court below, although conceding considerable merit in this excludability contention as an original question, felt bound by earlier expressions of this Court in *Commissioner v. Clise*, 122 F.2d 998 (1941). So constrained, the Court below concluded that Mrs. Grant had retained possession or enjoyment of the transferred property and, therefore, that the contracts were not excludable under the Technical Changes Act.

THE DATE OF DEATH VALUE OF THE CONTRACTS WAS \$60,980.

When Mrs. Grant purchased the contracts, there was an inter vivos transfer by her to plaintiff. The subject of the transfer was his irrevocable contractual right, as donee or third-party beneficiary, to receive the annuity payments for the rest of his life if and when he should survive Mrs. Grant. On the date of Mrs. Grant's death, it would have cost a female the same age as Mrs. Grant \$60,980 to have pur-

chased from the same insurance companies contracts obligating them to pay the same annuities to a male the same age as plaintiff contingent on his survival of the female (R. 125-141). Annuity contracts of this sort are known as "survivorship" contracts and, plaintiff contends, are equivalent to the survivorship provisions of the Grant contracts if the "comparable contract" measure of valuation is applicable. Therefore, the date of death value of the Grant contracts was \$60,980 which was the cost of comparable or survivorship contracts on that date.

The defendant claims a date of death value of \$257,117, this being the date of death cost of contracts obligating the same companies to commence payments forthwith to a male the same age as plaintiff without regard to the contingency of his survival of a female of the same age as Mrs. Grant; such contracts are known as "single life" contracts (R. 43). Such contracts are not actuarially comparable to the Grant contracts because, unlike the latter, there is no contingent element of survivorship.* Use of the cost of single life contracts as the measure of value of the survivorship provisions in the Grant contracts represents the substitution of an entirely different and more costly kind of property for valuation purposes.

Amount of Recovery

It has been stipulated that if the contracts were excludable from Mrs. Grant's gross estate or if their date of death value was \$60,980, plaintiff is entitled to recover the principal sum of \$29,397.68 (R. 62-63). This is the aggregate

*As the Court below held (R. 45), single life contracts also are not comparable to the Grant contracts from an economic benefit standpoint on account of substantial difference in income tax treatment. This is the point which is the subject of the briefs in defendant's cross-appeal.

amount plaintiff paid on September 22, 1950 to satisfy the asserted deficiency, and plaintiff cannot recover more than this amount under the applicable statute of limitations (1939 Code 910).

SPECIFICATION OF ERRORS

1. The Court below erred in concluding that the annuity contracts were includable in Mrs. Grant's gross estate instead of concluding that they were excludable under the retroactive provisions of the Technical Changes Act of 1949 (63 Stat. 891).

2. The Court below erred in finding and concluding that the contracts had a value of \$160,399 (discounted present worth) instead of \$60,980 (cost of comparable survivorship contracts).

ARGUMENT

I. The Annuity Contracts Were Excludable From Mrs. Grant's Gross Estate Under the Technical Changes Act of 1949.

Section 811(c) of the 1939 Internal Revenue Code, as it read when Mrs. Grant died in 1947, required the inclusion in gross estate of joint and survivorship annuity contracts when the purchaser was survived by the other annuitant. For that reason, the Grant contracts were included in the return filed for her estate in 1948.

In 1949, Section 7(a) of the Technical Changes Act (63 Stat. 891) retroactively amended Section 811(c) of the 1939 Code in several respects. The material portions of the amended statute read as follows:

“SEC. 811. GROSS ESTATE.

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

“(c) (As amended by Sec. 7(a) of Technical Changes Act of 1949—63 Stat. 891) *Transfers in Contemplation of, or Taking Effect at, Death.*—

“(1) *General Rule.* To the extent of any interest therein of which the decedent has at any time made a transfer * * * by trust or otherwise—

* * * * *

“(B) under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property * * * ; or

“(C) intended to take effect in possession or enjoyment at or after his death.

“(2) *Transfers taking Effect at Death — Transfers Prior to October 8, 1949.*—An interest in property of which the decedent made a transfer on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1)(C) of this subsection unless the decedent has retained a reversionary interest in the property * * * .”

Section 7(b) of the Technical Changes Act additionally provided that the amendment of Section 811(c) made by Section 7(a)

“shall be applicable with respect to estates of decedents dying after February 10, 1939.”

The effect of the retroactive 1949 amendment of Section 811(c) was to exclude from gross estate any property the subject of a pre-October 8, 1949 inter vivos transfer intended to take effect in possession or enjoyment on the transferor's death (hereinafter called “postponed enjoyment” transfer) if no reversionary interest was retained by the transferor and his death occurred after February 10, 1939.

A. THE PURCHASE OF THE ANNUITY CONTRACTS RESULTED IN A POSTPONED ENJOYMENT TRANSFER SATISFYING ALL REQUIREMENTS FOR EXCLUSION FROM GROSS ESTATE UNDER THE 1949 TECHNICAL CHANGES ACT.

Mrs. Grant died after February 10, 1939 (on March 2, 1947) and the transfer was made prior to October 8, 1949 (when she purchased the contracts in 1938 and 1939), thus meeting the date of death and date of transfer requirements of the amended statute. Plaintiff's enjoyment of the survivorship annuities was wholly contingent on his survival of Mrs. Grant so that the transfer patently was a postponed enjoyment transfer: *Pruyn's Estate v. Commissioner*, 184 F.2d 971 (C.A. 2—1950); *Morristown Trust Co. v. Manning*, 200 F.2d 194 (C.A. 3—1952). Mrs. Grant obviously had retained no reversionary interest because the contracts were irrevocable and, if plaintiff had predeceased her, the transferred property—plaintiff's contingent survivorship interest—would have terminated forever: *Pruyn's Estate v. Commissioner*, supra; *Higgs' Estate v. Commissioner*, 184 F.2d 427 (C.A. 3—1950). Thus, all elements of an excludable postponed enjoyment transfer were present.

We do not understand that defendant disputes this. He did not do so below. Rather, defendant argued that the transfer was *also* one by which Mrs. Grant retained for her life the possession or enjoyment of the transferred property or the income therefrom (hereinafter called "retained life interest" transfer). Admittedly, retained life interest transfers do not come within the exclusionary provision of paragraph (2) of sub-section (c) of Section 811 as added by the Technical Changes Act of 1949. If a particular transfer were a postponed enjoyment transfer which otherwise would qualify for exclusion from gross estate, it would be includable if it were also a retained life interest transfer. This brings us to grips with the crucial issue on this branch of

the case: Did Mrs. Grant's purchase of the annuity contracts result in a transfer to plaintiff whereby she retained a life interest in the transferred property (plaintiff's contingent survivorship interest) or the income therefrom?

B. THE PURCHASE OF THE ANNUITY CONTRACTS DID NOT ALSO RESULT IN A NON-EXCLUDABLE RETAINED LIFE INTEREST TRANSFER.

We are concerned in this case only with the survivorship provisions of the Grant annuity contracts. If any property was transferred to plaintiff for estate tax purposes, it was only by virtue of the survivorship provisions.* A careful analysis will show that the property transferred to Mr. Grant for present purposes was only a contract right to receive the annuities after Mrs. Grant's death if he survived. Mrs. Grant did not and could not retain for her life the possession or enjoyment of plaintiff's contingent survivorship right or the income therefrom.

(1) The Property Transferred to Plaintiff Was Only a Contract Right to Receive the Annuities After Mrs. Grant's Death If He Survived Her.

The transfer itself took place when Mrs. Grant purchased the annuity contracts during her lifetime. The mechanics of the transfer (or transfers) were simply her payment to each issuing company of the agreed cash consideration for each contract. Each company's contract obligated it to pay the stipulated annuities to Mrs. Grant and plaintiff jointly until the death of either and thereafter to the survivor. In computing the cost of each contract, each company took into account the respective life expectancies of Mrs. Grant and plaintiff as determined by mortality tables. She having been a female and also younger than plaintiff, her chance of sur-

*Actually, there was also another transfer to plaintiff. He was jointly entitled with Mrs. Grant to the annuities during their joint lives and his enjoyment of this feature was not postponed, but this right terminated with Mrs. Grant's death.

vival was greater and we may assume that of the total amount paid for each contract the smallest part was referable to the provision entitling him to continue to receive the annuities if he should be the survivor. It is also significant that the contracts were non-participating (in surplus), non-refundable (if both annuitants died before full—or any—return of purchase price), and irrevocable.

We now turn to the question: What was the precise character of the property which, for gross estate purposes, was transferred to plaintiff when Mrs. Grant purchased the contracts? A process of elimination may help in the search for the answer.

Obviously, Mrs. Grant did not transfer any part of the aggregate cash purchase price to plaintiff, nor did the insurance companies. The cash consideration was paid by her to the insurance companies as purchase price; it became an unidentifiable part of their general funds in return for their respective personal obligations to pay the specified annuities to both spouses jointly, first, and then to pay the same amounts as survivorship annuities to the surviving spouse, later. The cash consideration was not earmarked by the companies or chargeable with the annuities; there was nothing in the nature of a trust fund; no fixed principal sum as such or installments thereof were due from the insurance companies. Likewise, the survivorship annuity payments themselves which were paid after Mrs. Grant's death do not constitute the property transferred by her to plaintiff because, as we have noted, there was no specific fund or trust or principal sum chargeable with the annuities and of which the survivorship annuities were or could be the derivative fruit in either a corpus or income sense.

Bearing in mind that the transfer with which we are concerned was a transfer *inter vivos* from Mrs. Grant to

plaintiff—and that it took place at the precise moment when she purchased the survivorship contracts—and bearing in mind also that her death was simply the generating event which brought the subject of the transfer into actual enjoyment by plaintiff as survivor for the first time, it is perfectly clear that the property interest transferred to plaintiff in 1938 and 1939 was a *contract right* to receive and enjoy the annuities if and when he should survive, as he did in 1947. This right corresponded to the contract obligation of the companies as expressed in their annuity contracts to make the payments to him contingent on his survivorship. At the moment of purchase, plaintiff as transferee acquired nothing more or less than the status of a donee or third-party beneficiary under an irrevocable contract. This contract interest was in the nature of an enforceable chose in action; it was a property interest, although of very speculative value; in the absence of express prohibition in the annuity contracts, plaintiff's survivorship contract interest could have been sold or assigned by him at any time before, as well as after, Mrs. Grant's death (3 *C.J.S.* 1383, Sec. 7). The nature of the property transferred as a contract right is confirmed by the fact that under the Commissioner's own regulations (Reg. 105, Sec. 81.10(i)(2)), the value of a survivorship annuity contract is "established through the sale * * * of comparable contracts," provided, of course, that comparable ones are available.

This analysis of the nature of the property transferred as a result of the purchase of a survivorship contract finds expression in the well reasoned opinion of the Tax Court in 1950 in *Estate of Twogood*, 15 T.C. 989 (affirmed in 194 F. 2d 627), where the Tax Court, speaking of a survivorship annuity contract, said (p. 994):

“It must be remembered that the property with which we are concerned here consisted of the right to receive an annuity.”

Of course, the contract right to survivorship benefits which passes to the transferee-annuitant at the moment of purchase of the contract by the purchaser or nominator is a result of the purchase. This does not mean, however, that any part of the cash purchase price itself is transferred to the transferee-annuitant; the benefit or property which he receives is an entirely different one, both legally and realistically. If one pays cash to a car dealer for a car to be delivered to the purchaser's spouse at a future date, the property transferred to the donee-spouse at time of purchase is the contract right to receive the car and not the cash paid for it. Likewise, a contract right is all that passes to the survivor-annuitant. If and when he survives, he can begin to possess and enjoy for the first time the benefits of such right—the annuity payments—but they are only the fruit of the property transferred to him, i.e., the contract right created for his benefit at time of purchase. This being the essence and true nature of the property transferred, we will now show that Mrs. Grant (the purchaser or nominator in this case) retained no interest in plaintiff's survivorship contract right or, for that matter, in the cash purchase price which she paid for his survivorship right.

(2) Mrs. Grant Did Not Retain Any Life Interest in the Property Transferred to Plaintiff or the Income Therefrom.

At the outset we wish to state frankly that there are a few decisions, including one by this Court, which contain some language to the effect that the purchaser of a joint and survivorship annuity contract makes not only a postponed enjoyment transfer but also retains a life interest for gross estate purposes. Chronologically, these decisions are:

Commissioner v. Wilder's Estate, 118 F.2d 281 (CA 5—1941);

Commissioner v. Clise, 122 F.2d 998 (CA 9—1941);

Mearkle's Estate v. Commissioner, 129 F.2d 386 (CA 3—1942).

The question first arose in the *Wilder* case. However, in holding that there was a taxable transfer to the surviving annuitant, the court expressed doubt whether it was a retained life interest transfer (p. 283):

“The case does not fall under the last part of the above quoted clause about retaining possession or income (retained life interest transfer) so plainly as it does under the broad language preceding (postponed enjoyment transfer).”

In the *Clise* case, this Court expressed the view that there was both a postponed enjoyment and a retained life interest transfer. The court in the *Mearkle* case, following suit, thought that the *Clise* decision made it unnecessary to repeat an analysis of the problem.

In the *Clise* decision, it was said that Mrs. Clise, the purchaser, had not only made a postponed enjoyment transfer to her husband but also had reserved to herself the enjoyment or economic benefit of the contracts during her lifetime just as though she had created a trust for her lifetime benefit with remainder over to Mr. Clise. We respectfully submit that this particular basis for the decision should not be sustained because (1) it actually was unnecessary as a ground for decision inasmuch as taxable status was soundly based on the postponed enjoyment feature of the transfer, and (2) it is in direct conflict with a *multitude* of other tax cases holding that the purchaser does not retain a life interest. These other cases were not brought to this court's attention in the *Clise* case.

The *Wilder*, *Clise* and *Mearkle* cases were decided prior to the Technical Changes Act of 1949 so that there was no real need to make a close analysis of the precise nature of the transfer to the survivor-annuitant. The courts in those cases concluded that a survivorship contract was includable in the purchaser's gross estate either because there was a postponed enjoyment transfer or a retained life interest transfer or both. In either event, the transfer was taxable. In the later *Pruyn* and *Higgs* cases, *supra*, which construed the predecessor of Section 811(c) before it was amended in 1931 to include retained life interest transfers, the courts squarely held that the purchase of survivorship contracts effects a postponed enjoyment transfer, and taxable status was predicated on this ground alone. To the extent that *Clise* and *Mearkle* also so hold, they are on solid ground because there is no question that the enjoyment of the transferred property—the contingent survivorship right—is postponed until the transferee-annuitant's survival. But when *Clise* and *Mearkle* go further and say that the purchase transaction is also akin to the creation of a reserved life estate in the purchaser with remainder over, they reflect a profound misapprehension which understandably arose from the fact that prior to the Technical Changes Act of 1949 it was quite unnecessary to make any sharp discrimination.

The fact of this misapprehension is established by numerous tax cases where the courts (including Courts of Appeal, Court of Claims, Tax Court and many state courts) after analysis of the real nature of the purchase transaction have concluded that no life interest in corpus or income is retained by the purchaser of an annuity contract—whether it be a contract for the life of the purchaser alone (a “single life” contract) or, as here, a joint and survivorship contract.

We wish to emphasize that none of these decisions were called to the attention of this Court in the briefs in the Clise case, so that this Court did not have the benefit of knowing that its alternative ground for decision was in conflict with a long and well established line of federal and state court cases.

The opinions in these other cases stress that, on the purchase of an annuity contract, the consideration or purchase price is added to the common funds of the insurance company, becoming part of the company's general assets and losing any separate identity; that the company's obligation to pay the annuities is a purely personal one without regard to the existence of any earmarked fund or whether the company's earnings will be sufficient or not; that no interest or return of principal designated or identifiable as such is to be paid to the annuitant, who has an interest only in the annuity payments themselves and not in any principal fund or source from which they may be derived; that all of the distinguishing characteristics of a retained life interest are lacking, and that no possession or enjoyment of the transferred property or the income therefrom are retained by the purchaser in any sense.

See, for example, *Hirsh v. United States*, 35 F.2d 982 (Ct. Cl. 1925), where a father transferred securities to his children in consideration for their agreement to pay a single life annuity to him and a survivorship annuity to their mother. The Court of Claims held that the annuity contract was not includable in the father's estate as a transfer under which he had reserved the income for life, and said (pp. 985, 986):

“* * * The transfer was complete upon the execution of the contract and was absolute and without reservation. The transferees entered at once into the possession and enjoyment of the securities. There was no

restriction placed upon their sale or disposal. The transfer was absolute, and decedent completely and irrevocably divested himself of all title, right, or interest in the securities conveyed. It is clear also that the securities were not chargeable with the annuity. Each of the four children was personally obligated to pay a specified annuity regardless of whether any return was received from the securities and each child was financially able to pay the annuity. The decedent had no control whatever over the property conveyed after the transfer, nor did he have any power to change the terms or provisions of the annuity which had been contracted for in the case of each child.

"There seems to us to have been a misunderstanding on the part of the Commissioner as to the effect of the contract. No trust was created thereby.

* * * * *

"The defendant relies upon the case of *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S.Ct. 123, 125, 73 L.Ed. 410. In that case the property held to be taxable as part of the estate of the decedent had been conveyed by him in his lifetime in trust, reserving the income therefrom for the period of his lifetime and also the right to revoke the trust. It will be readily seen that the decedent in that case did not part with his interest in the property completely, but on the contrary still retained control of it."

In the *Twogood* case, *supra*, the Tax Court in dealing with a pension plan survivorship annuity contract said (p. 994):

"It must be remembered that the property (transferred) with which we are concerned here consisted of the right to receive an annuity * * *.

"It is clear that the decedent did not possess or enjoy in any way *the property* transferred to the beneficiary * * * (Our emphasis). Likewise, he did not retain *possession or enjoyment* of the *income* from such property (Emphasis by Court). The annuity payments

which the decedent received after his retirement did not flow from or have any relation to the property transferred—were irretrievably lost to decedent. In order for the decedent to have retained the income from property transferred, he must have made a transfer to the beneficiary of income-yielding property, the income from which he reserved for his life. This manifestly he did not do, either from a legalistic analysis of the mechanics of the translation or from a realistic view of the true nature of the transfer.”

In *Estate of Bergan*, 1 T.C. 543 (1943), the decedent transferred securities and other property to her sister in consideration for the sister’s promise to pay an annuity to the decedent for her life. This was a single life, not a survivorship, contract but is analogous for present purposes because the Commissioner argued that the decedent had retained for life the economic benefit of the transferred property so that it was includable in her gross estate. The Tax Court rejected this argument and said (pp. 550-552):

“The respondent further contends * * * that in substance the same result was achieved as if Miss Bergan had transferred the property in question in trust, reserving the income therefrom for life with the provision that upon her death the trust would cease and the corpus be distributed to Mrs. Goggin * * *.

“* * * Upon the completion of the transfer in 1933, the title vested in Mrs. Goggin, who was then free to use or dispose of the property in any way she desired. The transfer, although made in consideration for support, was unconditional and irrevocable. Miss Bergan could not possibly retrieve the property transferred or any part of it, and Mrs. Goggin could have disposed of all of it immediately if she had so desired.

“The respondent strongly contends that in substance Miss Bergan retained for her life the right to the income from the property transferred, and that for this

reason the property must be included in Miss Bergan's gross estate under Section 811(c), *supra*.

"* * * Mrs. Goggin was free to use the property transferred to her in any way that she pleased. The title vested in Mrs. Goggin and not in any trustee. Miss Bergan did not reserve to herself the income from the property transferred. She had entered into a contract with her sister for support and transferred the property in question as consideration for the contract."

The *Hirsh* and *Bergan* cases, *supra*, both involved single life contracts and in both the government argued that the purchaser-annuitant retained possession or enjoyment of the property transferred. If, as both courts categorically held, the purchaser of a single life annuity for her own benefit does not make a retained life interest transfer, then *a fortiori* the purchaser of a survivorship annuity for the benefit of another does not.

In *Estate of Gross*, 125 N.Y.S. 2d 149 (1953), there had been included in the decedent's gross taxable estate the value of a joint and survivorship annuity purchased by him several years previously. The surviving widow contended that the amount of state inheritance tax apportionable to the annuity should be collected from the insurance company as a person "in possession" of property included in the taxable estate. The court rejected this argument and said (p. 156):

"The contractual obligation of the company is to make the specified payments on the first day of each month provided the widow is then alive. There is no requirement that it pay out a fixed minimum amount, nor does it hold any funds on deposit. The company is not a stakeholder or trustee in possession of ascertainable funds but is rather a debtor whose liability is conditioned upon the survival of the annuitant on the first

of each month. Whether the liability be deemed subject to a condition precedent or a condition subsequent, the obligation does not mature until the first of each month, and then only to the extent of that payment. Death at any time prior to the aforesaid date terminates the company's engagements under the contract. As the liability of the company cannot be ascertained as any fixed sum, however small, and as its obligation matures periodically only, it cannot be said to be in possession of property within the contemplation of the statute."

In *Galpin's Estate*, 295 N.Y.S. 192 (1937), it was held that for estate tax purposes the purchaser under single life and survivorship contracts retained no life interest in the property transferred. The court said (p. 194):

"The deceased made an agreement whereby he was to receive a stipulated annual sum from the donee, and after his death others were to receive annuities. The agreements set forth and the evidence discloses that title to the sums of money involved passed to the donee during the lifetime of the donor and the funds thereafter were and remained in the possession of the donee.

"One test of the nature of the transaction would be the remedy of the donor in the event of the failure of the donee to have paid the stipulated annual sum. Could he have sued and obtained a cancellation of the agreement and a refund of the money deposited, or would his course have been a suit for the payment of his annuity? I think the latter. And if, by chance, the donee was insolvent, deceased would have been the loser, for there is nothing in the agreements which calls for the segregation of the sums of money paid * * * or the manner of investment of the same by the donee."

The following are some of the innumerable other typical federal and state court decisions holding that the purchaser of a single life annuity contract or, *a fortiori*, of a joint and

survivor annuity contract does not reserve or retain any possession or enjoyment of the property transferred or the income therefrom for estate or inheritance tax purposes:

Hughes v. Sun Life Assurance Co., 159 F.2d 110 (CA7-1946): "This sum (the purchase price for the annuity contract) became the property of Sun Life and was added to the common fund of the company; it ceased to have any separate identity and became part of the company's general assets * * *; hence Sun Life was not a trustee." (Pp. 111, 113)

Scott v. Commissioner, 29 F.2d 472 (CA7-1928): "In the new (joint and survivor) contract the father * * * conveyed the entire interest (in the partnership) absolutely to the sons, specifying as the consideration therefor these annual payments to the father and mother, and removed all interdependence between the annual payments and the profits of the partnership by making the payments a personal undertaking of the sons, wholly regardless of whether there were any partnership profits." (P. 473)

Lincoln v. U.S., 65 Ct. Cl. 198 (1928): "Assuredly it is not to be claimed that Mrs. Lincoln did not immediately divest herself of all title, right or interest in the property conveyed (to her children in consideration for their annuity contract). Beyond all doubt that was her intent * * *. The children were put into immediate possession of and enjoyment of the estate; they were free to use it as their judgment dictated; and if the income therefrom exceeded the sums to be paid the mother annually, the excess was their property * * *. A breach of the contract on the part of the children would not reinvest title in the mother." (Pp. 203, 204).

In re Honeyman's Estate, 129 Atl. 393 (N.J. 1925): "There is no restriction or incumbrance on what the donee may do with the thing transferred from the very moment of the transfer * * *. Whatever may hereafter happen to the thing transferred, whether it be by in-

vestment or reinvestment increased, or diminished, or entirely lost, whether the income received therefrom by the donee increases or decreases or vanishes, in no wise varies or affects the obligation of the donee under its promise or (joint and survivorship annuity) contract." (P. 396)

Commonwealth v. Beisel, 13 A.2d 419 (Pa. 1940): "Generally speaking, (an annuity) designates a right—bequeathed, donated or purchased—to receive fixed, periodical payments, either for life or a number of years. Its determining characteristic is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which they may be derived. The purchaser of an annuity surrenders all right and title in and to the money he pays for it." (P. 421)

Chisholm v. Shields, 66 N.E. 93 (Ohio 1902): "An annuity, as understood in common parlance, is an obligation by a person or company to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation * * *. In such an annuity there is no connection, in a tax sense, between the annuity and the gross sum paid therefor." (P. 94)

In re Krause's Estate, 191 Atl. 162 (Pa. 1937): "It is obvious that the donor (purchaser of the annuity) could not have taken the fund away from the college. He retained no interest either in the fund itself or in the income therefrom * * *. There was no restriction on what the college could do with the money. It could do with it as it pleased. The money has been mingled with the general funds of the college, and is not held by it separate and intact. It was not the fund which was liable for the payments to the donor but the college itself * * *. The donor was to get the annuity in a certain number of dollars, irrespective of what the fund made." (Pp. 163, 164)

In re Seaich's Estate, 240 N.Y.S. 524 (1930): "It appears that the decedent parted absolutely and unequivocally with both the possession and the enjoyment of the stock and the debentures as transferred (to his children in consideration for their annuity contract). * * * The gift was a completed one and the obligation for backing up the payment of the per monthly amount to the decedent was the obligation of the beneficiaries of the gift, quite apart from the gift. The decedent divested himself of title to the property when he executed the deed of gift which contained no right of reversion in any manner to himself." (Pp. 526-527)

All of the foregoing decisions and many others like them explicitly hold that no purchaser of *any* type of annuity contract, whether single life, joint life, or survivorship or any combination of these, retains any life interest either in the purchase price paid for the contract or the income therefrom or in the interest transferred to the survivor-annuitant in the case of a survivorship contract. Most, if not all, of these cases involved federal estate tax or state inheritance or estate tax liability and they are on all fours with the present case.

Apart from these precedents, *none of which were called to the attention of this Court in the Clise case* or, apparently, to the attention of the Court of Appeals for the Third Circuit in the *Mearkle* case, the proposition that Mrs. Grant did not make a retained life interest transfer to plaintiff may be illustrated forcefully in another way. We have seen that the only transfer to plaintiff—for gross estate purposes—resulted from the survivorship provisions and not, of course, from the joint life provisions of the contracts. Instead of purchasing joint and survivorship contracts, Mrs. Grant might have purchased separate single life contracts

for her own benefit and separate survivorship contracts for plaintiff's benefit. The net effect would have been precisely the same from an actuarial standpoint. How could it possibly be claimed that Mrs. Grant retained any life interest under such separate survivorship contracts? Combining the joint and the survivorship provisions in a single contract or piece of paper surely does not affect the result from a tax standpoint. If a wife pays \$6,000 to a car dealer for his single contract (a) to deliver to her a specified car today and (b) to deliver a similar one to her husband on her death if she dies (as she does) within six months leaving him surviving, what rational basis is there for contending that she retained an interest in the property transferred to him—whether such property be his contingent contract right to receive the second car (as we conceive it to be) or the car itself?

The Fifth Circuit in the *Wilder* case, supra, sensed that the purchase of a survivorship contract is not a retained life interest transfer "so plainly" as it is a postponed enjoyment transfer. The Court below had the benefit of the authorities which counsel in the *Clise* case failed to bring to this Court's attention, and the Court below, after referring to the doctrine of those authorities, said (R. 41):

"Were the question presented to the Court for the first time with no prior authority (the *Clise* case) the Court would be inclined to believe that there was considerable merit in plaintiff's contention that this was a transfer intended to take effect in possession or enjoyment after death and not a transfer wherein grantor retained for life any possession or enjoyment thereof or the right to the income therefrom."

Now, the *Clise* case was correctly decided on the ground that Mrs. Clise made a taxable postponed enjoyment trans-

fer to Mr. Clise, the survivor. We do not ask that the *Clise* case be overruled. We simply request that the alternate ground for decision in that case be held inapplicable to the present case in view of well established precedent which was not there brought to this Court's attention. The Technical Changes Act of 1949 points up sharply for the first time the need for differentiation between postponed enjoyment and retained life interest transfers.

II. The Grant Annuity Contracts Had a Value of \$60,980 Which Was the Date of Death Cost of Comparable or Survivorship Contracts.

Plaintiff made two separate valuation arguments below: *First*, that the Grant contracts should be valued at \$60,980 which is the date of death cost of comparable or survivorship contracts, whereas defendant's valuation of \$257,117 is the date of death cost of single life contracts which are not comparable from an actuarial or cost standpoint; and, *second*, and alternatively, that no comparable contracts (either survivorship or single life) were available on the date of death so that the Grant contracts had a value of \$160,399 determined in accordance with established actuarial principles. The Court below accepted plaintiff's alternative argument and that is the ground for defendant's cross-appeal.

Plaintiff, as will appear in his brief to be filed in answer to defendant-appellant's brief in the latter's cross-appeal, is convinced that the Court below correctly determined that *no* comparable contracts were available for valuation purposes. Such determination was based on differences in economic benefits flowing from unequal income tax treatment of the annuity payments under the Grant contracts on the one hand and under date of death single life or sur-

vivorship contracts on the other hand. However, if the substantial difference in income tax treatment of the annuities is laid to one side and if, as defendant contends, the Grant contracts should have been valued under the "comparable contract" rule of subparagraph (2) of Section 81.10(i) of Regulations 105 (quoted on page 3 of this brief), they had a value of \$60,980. This is what it would have cost to purchase equivalent survivorship contracts on the date of Mrs. Grant's death (R. 125-141). The defendant's adjusted value of \$257,117 cannot be sustained because it represents the cost of single life contracts which are not comparable from an actuarial or cost standpoint.

The Grant contracts were joint and survivorship contracts which had been purchased by Mrs. Grant. The annuity payments were to be made to Mr. and Mrs. Grant during their joint lives and then to the survivor for the rest of his or her life. Mrs. Grant was the first to die. At her death in 1947, the joint aspect of the contracts came to an end and plaintiff, as survivor, became entitled for the first time to the benefit of the survivorship feature.

The transfer to plaintiff for estate tax purposes took place when Mrs. Grant purchased the contracts in 1938 and 1939. It was an inter vivos transfer for purposes of 1939 Code 811(c), quoted on pages 7-8 of this brief. At the time of purchase, Mrs. Grant gave—or transferred—to plaintiff a then present and irrevocable right to deferred or survivorship annuities to commence on her death if he should survive her. He did. The question now is: What was the value in her estate of this previously transferred contingent right at the time of her death in 1947?

Subparagraph (2) of Section 81.10(i) of Regulations 105 (quoted on page 3 of this brief) states that the answer will be found by taking the cost of "comparable contracts"

as of the date of death. This brings us to the vital question: What kind of contracts are comparable to the survivorship provisions of the Grant contracts? Here, we emphasize again that in determining comparability it must be kept in mind that we are valuing only the survivorship feature of the Grant contracts. For estate tax purposes, only the survivorship feature was the subject of the transfer from Mrs. Grant to Mr. Grant. This consisted of his contingent right to receive the annuities for the rest of his life if and when he should survive her.

Starting with this premise, it is perfectly clear that only annuity contracts of the sort known as "survivorship" contracts are comparable to the survivorship provisions of the Grant contracts for estate tax valuation purposes. A survivorship contract is one which, just as in the case of the survivorship provisions of the Grant contracts, provides for payment of annuities to a designated annuitant commencing if and when the annuitant survives the purchaser, who is sometimes called the nominator. The cost or purchase price is determined in accordance with established actuarial principles (see E. F. Spurgeon: *Life Contingencies*, 1939 ed., Chap. VII, for the actuarial formula). Two life expectancies—determined from mortality tables—must be taken into account in computing the cost. The cost where the annuitant is older than the nominator would be less than where the annuitant is younger because there would be less actuarial chance of the older annuitant surviving the younger nominator and thereupon becoming entitled to the annuity payments. From a cost standpoint, the significant thing is that annuity payments under a survivorship contract are deferred and *are not to commence unless and until the annuitant survives the nominator*. In the present case, the fact that Mrs. Grant (the nominator)

was younger than Mr. Grant (the annuitant) is reflected in the fact that on the date of her death comparable or survivorship contracts would have cost only \$60,980 or less than one-quarter of the cost of the "single life" contracts erroneously relied on by defendant.

A "single life" annuity contract, on the other hand, expressly provides for annuity payments *commencing at once* and for this reason is sometimes called an "immediate" annuity. Only a single life expectancy is involved and there is no deferred or survivorship element. In computing the cost of a single life contract, the issuing company takes into account the actuarial life expectancy of the particular annuitant and the fact that annuity payments are to begin at once and continue for the rest of his life. The difference in cost between a survivorship contract and a single life contract for the benefit of the same annuitant is highlighted in this case. On March 2, 1947, it would have cost a female purchaser the same age as Mrs. Grant only \$60,980 to purchase survivorship contracts for the benefit of a male the same age as Mr. Grant whereas it would have cost \$257,117 on that date for the purchase of single life contracts for his benefit.

The survivorship provisions of the Grant contracts are not comparable to single life contracts. As the subject of an inter vivos transfer by Mrs. Grant when she purchased the contracts in 1938 and 1939—and the value of which we must now determine as of the time of her death on March 2, 1947, the survivorship provisions of the Grant contracts at all times during her lifetime vested in Mr. Grant only a right to survivorship annuities *contingent on his survival of her*. The value of this contingent right on March 2, 1947 was \$60,980, which is what it would have cost on that day to purchase comparable or survivorship contracts which would pay the same annuities on the same contingency.

Defendant, in relying on the cost of single life contracts determined after Mrs. Grant's death, closes his eyes to the fact that in valuing the survivorship provisions of the Grant contracts we must by definition take into account two life expectancies—both hers and plaintiff's—not just plaintiff's. Defendant at this point fails to distinguish between the value of the property (a contingent survivorship right) actually transferred by Mrs. Grant to plaintiff during her lifetime and the value of an entirely different contractual relationship which came into existence between plaintiff and the insurance companies only *after* Mrs. Grant's death. *It was the fortuitous fact of plaintiff's survival—despite his shorter life expectancy—and not the inter vivos transfer by Mrs. Grant* or any general improvement in economic conditions which made the Grant contracts more valuable in plaintiff's hands. This greater value in his hands was simply the incidental result of Mrs. Grant's failure to live out her own life expectancy as determined by mortality tables—but this event added nothing to the value of the contingent survivorship contract right which was the subject of the transfer which she made in her lifetime.

The error in defendant's reliance on the cost of single life contracts may be illustrated in another way. Assume that at 9:00 A.M. on March 2, 1947 (the date of Mrs. Grant's death), a female purchaser 66 years old had purchased from Annuity Insurance Company for \$60,980 a survivorship annuity contract obligating the company to pay an annuity of \$20,774 per year to plaintiff, then 67 years old, if and when he should survive the purchaser. Assume, also, that at 9:30 A.M. on the same day the female purchaser had been accidentally killed. Under defendant's theory, the \$60,980 paid by the purchaser at 9:00 A.M. suddenly becomes a transfer of \$257,117 at 9:30 A.M. of the same day!

Defendant overlooks the fact that Mrs. Grant never purchased or transferred to plaintiff and he never received any "single life" contract. The right of a person aged 67 to receive \$20,774 per year for life beginning at once (as under a single life contract) is in no sense comparable to his right to receive the same annuity only if and when he should survive a female aged 66. It is the latter right—a contingent survivorship right—which must be valued in this case. This is all that Mrs. Grant transferred when she purchased the contracts in 1938 and 1939. This is corroborated in *Estate of Higgs*, 12 T.C. 280 (1949), where the Tax Court said (p. 283):

"The transferred property was not an annuity for the life of the widow (a single life contract) but was a *survivorship annuity payable* to her for that part of her life *after his death, upon condition that she survive him.*" (Our emphasis).

In the *Higgs* case, the Bureau had contended that the Higgs survivorship annuity contract should have been valued at \$78,036 which it would have cost for purchase of a single life annuity contract on the date of Mr. Higgs' death. Mrs. Higgs argued that the Higgs annuity contract should be valued at \$33,867 which it would have cost to purchase a survivorship contract. The Tax Court initially rejected the taxpayer's argument for lack of proof of the cost of a survivorship annuity as of the date of death (12 T.C. 283). On reargument on this issue, the missing proof was supplied and the Tax Court held in an unreported decision that the Higgs contract should be valued at \$33,867 which was the cost of a survivorship contract (see the first footnote to the Court of Appeals' opinion in 184 F.2d at page 428; also Bliss, "Widows' Pension Plans and the Higgs Case," Eighth Annual Institute on Federal Taxation, N. Y.

University, 1949, pp. 376-384). The Court of Appeals reversed on the ground that the contract was excludable from gross estate under the Technical Changes Act of 1949 adopted after the Tax Court's decision: *Higgs' Estate v. Commissioner*, 184 F.2d 427 (C.A. 3—1950).

The Tax Court in 1950 reaffirmed its position on this point in *Estate of Twogood*, 15 T.C. 989 (affirmed in 194 F.2d 627), although actually holding that the retroactive exclusionary provision of the Technical Changes Act was applicable. The Bureau had contended that the survivorship annuity payable to Mrs. Twogood on her husband's death should have been valued at \$107,945 which was the date of death cost of a single life contract paying the same annuity. The Tax Court made a finding that the Twogood contract should be valued at only \$19,328 which was the date of death cost of a survivorship contract paying the same annuity. The Tax Court said (pp. 991-2):

“A survivorship annuity is an annuity payable during the lifetime of a person (sometimes called the annuitant) commencing upon the death of another person (sometimes called the nominator). The annuity which Theresa E. Twogood received was a survivorship annuity. The seller of such an annuity, in computing the cost, must consider the age of the parties and the actuarial possibility of the annuitant surviving the nominator. * * * The actuarial formulae involved in the cost computations of such an annuity are dependent upon well recognized and established mortality tables.

“The value of the survivorship annuity involved herein, which would pay Theresa E. Twogood \$416.67 per month for the remainder of her life, was, on April 28, 1944, the date of decedent's death, \$19,328.57.”

Defendant relied below on the following citations:

United States v. Ryerson, 312 U.S. 260 (1941);

Estate of Walker, 8 T.C. 1107 (1947);

Mearkle's Estate v. Commissioner, 129 F.2d 386
(CA 3—1942);

United States Trust Co. v. Higgins, 56 F. Supp. 997
(S.D. N.Y. 1942);

Estate of Welliver, 8 T.C. 165 (1947).

The *Ryerson* and *Walker* cases did not involve annuity contracts and go no further than holding that replacement cost is the correct measure of value of *life insurance* contracts in a proper case. They have no application here. The *Welliver* case also is not akin to the present one. It holds only and correctly that cost of comparable annuity contracts is to be determined as of date of death and not as of date of transfer.* It would be apropos here only if we were contending that the cost of equivalent or comparable survivorship contracts as of March 2, 1947 should be ascertained by using mortality tables, loading charge factors and assumed interest rates which were in effect when the Grant contracts were purchased instead of those being used by the issuing companies on the date of death. In the other two cases cited, the taxpayers questioned the applicability of the "comparable contract" valuation method to annuity contracts on various grounds but not on the ground that single life contracts are not comparable from an actuarial or cost standpoint. That issue was not raised.

We have read both the taxpayers' and the government's briefs in virtually all of the annuity contract valuation cases hereinbefore cited by us or cited below by the defendant, including *Higgs*, *Twogood*, *Pruyn*, *Clise*, *Mearkle* and others. We find that only in the *Higgs* case (12 T.C. 280) and *Twogood* case (15 T.C. 989) did the taxpayers make our argument that for replacement cost purposes only survivorship contracts — and not single life contracts — are

comparable. In both of them the Tax Court sustained the argument and the respondent Commissioner of Internal Revenue did not appeal. If, then, we confine ourselves to judicial precedent, we find that the "survivorship" vs. "single life" argument was not raised by the taxpayer in any of the valuation cases relied on by defendant. *On the other hand, the taxpayer was sustained in both cases in which the issue was raised.*

Defendant also argued below that plaintiff, in relying on the comparability of survivorship contracts for cost or value purposes, is looking only at "the value to a contingent beneficiary of his expectancy in an estate prior to the donor's death." There are two basic errors in this conception of our argument. First, we are looking at the value of the precise kind of property purchased and transferred by the donor in her lifetime; second, we are looking for this value at the moment of the donor's death. It is rather defendant who is looking at the value *to the beneficiary* determined *after* the donor's death.

What defendant does is to substitute another kind of property and ascertain the cost to plaintiff of this different and more costly kind of property *after* Mrs. Grant's death. This reflects a serious misconception of the nature of the transfer—and of the subject of the transfer—for estate tax purposes. It cannot be denied that the transfer was an *inter vivos* one when Mrs. Grant purchased the contracts years before her death. Whatever plaintiff got as a transferee from her he got then, and nothing she or he could do thereafter could enlarge, diminish or change what she had given him. She did not transfer anything to him by her death; nothing passed to him at her death. The character of what she had transferred years before did not change by her death. It had long since become fixed and was irrevocable

by either of them. This was the precise nature of the transfer and it was the fact of its *inter vivos* character which brings it within the orbit of 1939 Code 811(c)(1).

Now, what was the subject of this *inter vivos* transfer to plaintiff? It was a group of fourteen contract rights to the annuity payments if and when he should survive. This is all that Mrs. Grant as transferor ever purchased or gave to him. Expressed more actuarially, each contract obligated the issuing company to pay the annuities to a male one year older than the female purchaser if and when he should survive her contrary to normal expectancy. The contracts did not provide for payments to plaintiff beginning March 2, 1947 or at any other fixed or determinable date at the time when they were purchased and the transfer took place. All that was transferred by Mrs. Grant was a contingent right the cost to her of which reflected that she was purchasing for plaintiff's benefit a gamble in the strictest sense. Plaintiff might never have enjoyed the rewards of this gamble. Mortality tables said he probably would not. When Mrs. Grant's prior death brought him the enjoyment of the survivorship provisions for the first time, it was not because of any testamentary transfer—the transfer from Mrs. Grant had occurred years before—but because of the fortuitous event of his survival. *But this event did not change the character either of the transfer or of the property transferred from the standpoint of the decedent or her estate.* As the Tax Court said in *Twogood*, "the transferred property was not an annuity for * * * life but was a survivorship annuity" payable to the survivor for that part of the survivor's life after the purchaser's death, upon condition of survival.

The mistake which defendant makes is in failing to realize that the transfer itself occurred years before the trans-

feror's death and then in substituting an entirely different kind of property for valuation purposes. Defendant says that we are to take the cost *to plaintiff after Mrs. Grant's death* of contract rights to annuities to be paid *commencing March 2, 1947*. But Mrs. Grant never purchased or transferred to plaintiff any single life contract rights and the cost to plaintiff after her death of such rights is no criterion of the cost or value of the essentially different—and far less valuable—survivorship rights actually transferred by her.

Defendant also relied below on *Wishard v. United States*, 143 F.2d 704 (CA 7—1944), for the proposition that the property “must be valued in the condition in which it passed to the transferee.” There the property was a cash surrender right and the cash surrender table in the policy itself fixed the amount of cash to be paid on any given date. The policy could have been surrendered at any time before the death of the husband so the transfer to the widow did not occur in a complete or taxable sense until his death. *Both the property and its enjoyment* passed to the wife only at death. In our case, the property irrevocably passed and the transfer took place years before Mrs. Grant's death and the authorities hold that, generally speaking, what the law taxes is not the interest to which the transferee succeeds but the interest transferred or which ceases. See, for example, *YMCA. v. Davis*, 264 U.S. 47, 50 (1924):

“What was being imposed here was an excise upon the transfer of an estate upon death of the owner. *It was not a tax upon succession and receipt of benefits* under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased* by reason of the death. *Knowlton v. Moore*, 178 U.S. 41, 48, 49.” (Our emphasis)

The basic rule that the Federal Estate Tax is imposed upon the interest transferred and not, as defendant mistakenly asserts, upon "the value of what the beneficiaries actually get" was recognized by this Court in *Commissioner v. Clise*, supra (122 F.2d at p. 1001):

"The Federal Estate Tax is levied upon the privilege of transmission of property at death. *Saltonstall v. Saltonstall*, 276 U.S. 260, 270, 48 S.Ct. 225, 72 L.Ed. 565. It is 'death duties,' as distinguished from a legacy or succession tax. *It does not tax the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of death*; what is imposed is an excise upon the transfer of an estate upon death of the owner. *Nichols v. Coolidge*, 274 U.S. 531, 537, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; *Young Men's Christian Ass'n. v. Davis*, 264 U.S. 47, 50, 44 S.Ct. 291, 68 L.Ed. 558; *Edwards v. Slocum*, 264 U.S. 61, 62, 44 S.Ct. 293, 68 L.Ed. 564; *Knowlton v. Moore*, 178 U.S. 41, 47, 49, 20 S.Ct. 747, 44 L.Ed. 969." (Our emphasis)

Defendant tried below to make something of the fact that because of the condition of her health the insurance companies would not on the date of Mrs. Grant's death have sold to her survivorship contracts for plaintiff's benefit. Defendant reasoned from this that "a survivorship annuity contract would be actually worth substantially the same *to plaintiff* as the cost to him of a single life annuity on that day." Here, again, defendant overlooks that the test is not the worth of anything to plaintiff but is the value of the precise property transferred. The transfer by Mrs. Grant took place years before her death. The question we face is what was the value—not to plaintiff—but the fair or market value—of the same property on the subsequent date of death. The fact that Mrs. Grant because of her health may have been disqualified on the day of her death from purchas-

ing the same kind of property which she had previously bought and transferred to plaintiff does not at all vitiate the value test. The question is: What would the issuing companies have charged *any* qualified 66 year old female purchaser on March 2, 1947 for equivalent survivorship contracts for the benefit of plaintiff or any 67 year old male? This is the test of value here—just as the market quotation of a listed stock is the test of its value even though a particular legatee might be financially or otherwise disqualified from purchasing such stock himself on the date of his testator's death.

Finally, defendant protested below the dramatic force of our example of a woman who pays \$60,000 for a survivorship contract which the government values in her estate at \$257,000 upon her accidental death a few moments later! Defendant said that if there is an absurdity in this situation it is not because of the Commissioner's regulations but because the statute requires property to be valued as of date of death and not at original cost, citing the hypothetical case of one who buys land one day followed both by discovery of oil and by his death on the next day. We, of course, do not contend at all that original cost is any criterion of value here. Our dramatic example is simply one way of illustrating that what defendant is trying to do is to substitute an entirely different and far more costly kind of property for the property actually transferred. The absurdity which we demonstrate arises not because of the statutory requirement of date of death valuation but because the Commissioner misapplied his own "comparable contract" valuation rule by substituting a different sort of property—single life contracts—to be valued. In defendant's oil well case, the property was transferred at death and was land containing oil; the value of the land for estate tax purposes would be its value with oil. In our case, the prop-

erty was transferred long before death and was a contingent survivorship right; its date of death value must reflect two life expectancies and the contingency of survivorship. The value of a more costly single life contract calling for immediate payments commencing on a date certain has no bearing either under the statute or the Commissioner's own regulation.

Going back to our hypothetical case of the 66 year old female purchaser who sets out early one morning to purchase an annuity contract, we have four possible variations:

Case A: She sets out intending to buy a survivorship annuity contract which would pay \$20,774 per year for the benefit of a 67 year old male if he should survive her. She has \$60,000 in currency in her purse for this purpose but she dies before reaching the insurance company office.

Case B: She reaches the office and purchases the survivorship contract for \$60,000 but dies 30 minutes later.

Case C: She sets out intending to buy for the benefit of the same male a single life contract which would pay him the same amount per year for life commencing the very next day and she has \$257,000 in currency in her purse for this purpose. She dies before reaching the insurance company office.

Case D: She reaches the office and purchases the single life contract for \$257,000 but dies 30 minutes later.

In Case A, the purchaser unsuccessfully tried to carve out and segregate from her estate the capital sum of \$60,000; in Case B, she succeeded a few moments before her death. In Case C, she unsuccessfully tried to carve out and segregate from her estate the capital sum of \$257,000; in Case D, she succeeded a few moments before her death.

Her estate naturally would be charged with tax on the capital sum of \$60,000 in Case A; the tax naturally would be on the capital sum of \$257,000 in Case C and on the \$257,000 value of the single life contract in Case D. It is perfectly clear to us that the imposition of tax on a valuation of \$257,000 in Case B as well would be nothing less than unconscionable and wholly incongruous. Defendant's effort to impose it in the present case reflects full failure to discriminate between (1) purchase of a contingent survivorship right which the transferee may never enjoy and (2) purchase of a contract for payment of immediate benefits to him regardless of whether or not the purchaser predeceases the transferee. The cost, value or worth of the latter kind of property right is far greater than—and hence no fair measure of the value of—the former. If defendant were to prevail on this valuation issue, the result would be to thrust upon Mrs. Grant's estate the burden of a vastly increased tax measured by a far more valuable or costly kind of property than she ever purchased, transferred or segregated from her estate.

CONCLUSION

Mrs. Grant's purchase of the annuity contracts resulted in a postponed enjoyment transfer to plaintiff with respect to the survivorship provisions. Mrs. Grant did not retain any enjoyment of the property transferred or the income therefrom because the property transferred was an irrevocable survivorship contract right. Mrs. Grant had no interest in this survivorship right and it would have terminated forever if plaintiff had predeceased her. She retained no interest in the consideration paid for the survivorship provisions because the purchase price became part of the general funds of the issuing companies without earmarking

and the companies assumed simply a personal liability. Therefore, the Grant annuity contracts were excludable from Mrs. Grant's gross estate under the retroactive provisions of the Technical Changes Act of 1949.

Regardless of their excludability from Mrs. Grant's gross estate, the Grant contracts had a date of death value of \$60,980 under the "comparable contract" rule of valuation. This is what it would have cost for purchase of equivalent or comparable survivorship contracts on the date of death. Single life contracts, which would have cost plaintiff \$257,117 on the date of death, are not comparable because they take no account of the element of contingency in the survivorship provisions of the Grant contracts. The property transferred by Mrs. Grant for estate tax purposes was a *contingent* survivorship contract right. In valuing this right, account must be taken of two life expectancies and of the actuarial probability of her survival of plaintiff. In this regard, the estate tax in the case of an *inter vivos* transfer is not imposed on the value to the survivor of what he comes into enjoyment of after the transferor's death but is imposed on the value of the precise property transferred by the transferor in her lifetime. The value of comparable property on the date of death was \$69,980 in this case.

For either or both of the foregoing reasons plaintiff is entitled to recover the principal sum of \$29,397.68 with interest as provided by law.

Respectfully submitted,

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No. 14,549

United States Court of Appeals
For the Ninth Circuit

SPENCER GRANT, Executor of the Last
Will and Testament of BLANCHE
KELLEHER GRANT, Deceased,
Appellant and Appellee,
VS.

JAMES G. SMYTH, Former Collector of
Internal Revenue,
Appellee and Appellant.

On Appeals from the Judgment of the United States District
Court for the Northern District of California.

BRIEF FOR THE COLLECTOR.

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PAUL P. O'BRIEN,
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No. 14,549

United States Court of Appeals For the Ninth Circuit

SPENCER GRANT, Executor of the Last
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Appellant and Appellee,

vs.

JAMES G. SMYTH, Former Collector of
Internal Revenue,

Appellee and Appellant.

On Appeals from the Judgment of the United States District
Court for the Northern District of California.

BRIEF FOR THE COLLECTOR.

OPINION BELOW.

The only previous opinion in the present case is that of the District Court (R. 37-48), which is reported in 123 F. Supp. 771.

JURISDICTION.

These cross-appeals involve federal estate taxes of Blanche Kelleher Grant, who died on March 2, 1947.

(R. 37-38.) The taxes in dispute, in the amount of \$29,235.79, together with interest in the amount of \$161.89, were paid by the executor on September 22, 1950. (R. 35, 38.) An amended claim for refund was filed on November 27, 1951 (R. 35), and more than six months elapsed without any decision on the refund claim by the Commissioner of Internal Revenue. Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on June 2, 1952, the executor brought an action in the District Court for the recovery of the taxes paid, and for such additional sum to which the estate would be entitled when the deductible amount of its attorney's fees and disbursements had been established, and for its costs of suit. (R. 3-29.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment was entered on July 15, 1954. (R. 48-49.) Within sixty days and on September 9, 1954, a notice of appeal was filed by the executor. (R. 50.) Within sixty days and on September 10, 1954, a notice of appeal was filed by the Collector. (R. 53.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Where during her life the decedent had purchased annuities payable to her and her husband jointly and, upon the death of either, to the survivor for life, and she died before her husband, whether the court below correctly decided that the value of the annuities acquired by the husband at the dece-

dent's death should be included in her gross estate within the meaning of Section 811 (c)(1)(B) of the Internal Revenue Code of 1939, as amended.

2. Whether, under Treasury Regulations 105, Section 81.10(i), the value of the annuities to be included in the gross estate is (a) the replacement cost of single life annuities, as the Collector contends, (b) the value of single life annuities under Table A of Treasury Regulations 105, Section 81.10(i), as the court below decided, or (c) the replacement cost of survivorship annuities, as the executor contends.

STATUTE AND REGULATIONS INVOLVED.

Internal Revenue Code of 1939:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(c) [As amended by Sec. 7(a), Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers in Contemplation of, or Taking Effect at, Death.*—

(1) *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; or

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

* * * * *

(26 U.S.C. 1952 ed., Sec. 811.)

Treasury Regulations 105, Relating to the Estate Tax under the Internal Revenue Code of 1939:

Sec. 81.10. *Valuation of property.*—* * *

* * * * *

(i) *Annuities, life, remainder, and reversionary interests.*—* * *

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

* * * * *

STATEMENT.

The facts as found by the District Court (R. 38) are as follows:

Mrs. Grant, hereinafter called the decedent, purchased fourteen annuities in 1938 and 1939 aggregating in cost \$390,000. The insurance companies agreed to pay to the decedent and her husband jointly, during the decedent's lifetime, \$20,744.52¹ annually. After the decedent's death, her husband, if he survived, was to receive the same amount per year for the remainder of his life. These contracts were "single premium non-participating and non-refundable joint and survivorship annuity contracts." At the time of the purchase the decedent was about fifty-eight years of age and her husband was about fifty-nine. (R. 38.)

The decedent died on March 2, 1947, at the age of sixty-seven, survived by her husband. An estate tax return was filed which included the above-mentioned annuities in the gross estate at a value of \$160,399.45. This was based on a table of mortality as provided in the Treasury Regulations when there are no comparable contracts for purposes of valuation. The commissioner took the position that there were comparable contracts and re-valued the annuities at \$257,117.20, resulting in a deficiency in estate tax in the amount of \$29,235.79. This, together with interest in the amount of \$161.89, was paid by the executor

¹At other places in the record the figure \$20,774.52 is used. (R. 5, 14, 45.) Perhaps the last-named figure is more accurate.

on September 22, 1950. An action for refund was filed on June 2, 1952. (R. 3-29, 38.)

The court below decided that the annuities are includable in the decedent's gross estate under Section 811(c) of the Internal Revenue Code of 1939, and that the correct valuation is \$160,399.45. (R. 39-48.) Both the executor and the Collector filed appeals to this Court. (R. 50, 53.)

**STATEMENT OF POINTS TO BE URGED
BY THE COLLECTOR.**

The court below erred:

1. In failing to hold that the annuity contracts which were transferred upon the death of the decedent from the decedent and her husband jointly to her husband alone were comparable to single life annuities within the meaning of Section 81.10(i)(2) of Treasury Regulations 105.

2. In holding that Section 81.10(i)(2) of Treasury Regulations 105 was not applicable to the present case because the annuities were not comparable to single life contracts, and at the same time valuing the contracts under Table A of Section 81.10(i)(3) of Treasury Regulations 105 as though the contracts were single life annuities.

3. In holding that the value of the annuity contracts was \$160,399.45, as reported in the estate tax return, and not \$257,117.20, as determined by the Commissioner of Internal Revenue.

SUMMARY OF ARGUMENT.

1. Under Section 811(c)(1)(B) of the Internal Revenue Code of 1939, the value of the gross estate of a decedent shall include the value at the time of his death of all property to the extent of any interest therein of which he has at any time made a transfer by trust or otherwise under which he has retained for his life the enjoyment of the property. Here the decedent purchased during her life annuity contracts under which a certain sum was to be paid to her and her husband jointly during their lives, and to the survivor upon the death of either one. Upon the death of the decedent, the husband alone acquired the right to the annuities for the rest of his life. In a case similar to this in all material respects this Court held that the value of the annuities should be included in the decedent's gross estate. The Court below correctly decided that the above-mentioned decision was controlling here. Furthermore, there are decisions of two other circuits to the same effect.

The executor argues in his brief that under the so-called Technical Changes Act of 1949 the annuity contracts are excludable from the decedent's estate; however, he concedes that the argument rests upon the premise that the decedent did not retain a life interest in the annuity contracts. The court below held that this Court had conclusively decided in the above-mentioned case similar to the present that the purchaser of a joint and survivor annuity retains a life interest. Therefore, by the executor's admission, the Technical Changes Act of 1949 does not require

that the annuity contracts be excluded from the estate.

2. Upon the death of the decedent, it is undisputed that her husband became entitled to annuities aggregating \$20,744.52 per annum for the rest of his life. The Treasury regulation provides that the value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts. The validity of the Treasury regulation has been upheld in several decisions. In accordance with this regulation, each of the insurance companies which wrote the original contracts was asked to furnish the cost of a single life annuity for a man of the age of the decedent's husband on March 2, 1947, the date of the decedent's death. The aggregate cost of the annuities was about \$257,000, which was the value placed upon the annuity contracts for estate tax purposes by the Commissioner of Internal revenue. While the court below did not question the validity of the Treasury regulation, it clearly erred in holding that a single life annuity for the husband was not a comparable contract. Furthermore, after holding that single life annuity contracts were not comparable to what was transferred to the husband upon the decedent's death, the court below determined the value of the contracts to be \$160,399.45, which is based upon the premise that the annuities were single life contracts and applies a mortality table instead of an annuity table, uses a higher rate of interest than that used by companies

engaged in the business, and has no loading factor or age set-back.

ARGUMENT.

I.

THE VALUE OF THE ANNUITY CONTRACTS ACQUIRED BY THE DECEDENT'S HUSBAND AT HER DEATH SHOULD BE INCLUDED IN HER GROSS ESTATE UNDER SECTION 811(c) (1)(B) OF THE INTERNAL REVENUE CODE OF 1939, AS AMENDED.

Section 811(c)(1)(B) of the Internal Revenue Code of 1939, *supra*, provides in part that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise under which he has retained for his life the enjoyment of the property. In this case the decedent during her life purchased a number of annuity contracts from insurance companies for \$390,000, under which annuities aggregating \$20,-744.52 were to be paid each year to the decedent and her husband during their joint lives and to the survivor of them for his or her life. (R. 5, 38, 64-99.) The decedent died on March 2, 1947, and the annuity contracts were included in her estate tax return at the aggregate value of \$160,399.45, as of the date of death. (R. 34-35, 38, 100-104.) However, in the amended claim for refund filed by the estate, the executor took the position that the annuity contracts are not includable in the gross estate. (R. 9, 11, 16-17.) The court below correctly decided that the

annuities were includable in the decedent's gross estate upon the authority of the decision of this Court in *Commissioner v. Clise*, 122 F. 2d 998, certiorari denied, 315 U.S. 821, because that case is similar in all material respects to the present.

The *Clise* case involved estate taxes of a woman who during her life purchased sixteen single-premium, joint and survivor, non-participating annuity contracts, in varying amounts, each payable to the decedent during her lifetime as the first annuitant, and to a designated second annuitant upon the death of the first annuitant. The named successor annuitant in each instance actually survived the decedent. The decedent's personal representative having failed to include the value of the annuities in the gross estate, the Commissioner determined a deficiency on the ground that the decedent had retained a life interest in the property under Section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169. After the Board of Tax Appeals held that the last-mentioned statute did not in terms apply (*Clise v. Commissioner*, 41 B.T.A. 820), this Court reversed the decision of the Board and held that the value of the annuities should be included in the gross estate under the statute in question. This Court said (122 F. 2d 998, 1003-1004):

Unquestionably, Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts during her lifetime. This is true, just as surely as though she had

created a trust fund with her property-money, and reserved to herself a certain sum annually, to be paid out of income and corpus, with the remainder over. Mrs. Clise reserved to herself the complete enjoyment of her property, during her lifetime, to the extent she desired to enjoy it, relieved of the worry and cares of management, and guaranteed an estate to the objects of her bounty after her death. It is clear, therefore, that Mrs. Clise retained to herself the economic benefits of her property during her lifetime.

* * * * *

Again, the annuities must have been based upon the life expectancy of the second annuitants, who were younger than the first annuitant. Reasoning from this, it follows that the decedent had reserved a life estate in the proceeds of the contracts, which would leave the value of the respective contracts taxable to her estate under Section 302(c): “* * * of which [decedent] has at any time made a transfer, * * * under which he has retained for his life * * * the * * * enjoyment of * * * the property, * * *.”* * *

* * * * *

The practical effect of the annuity contracts was to reserve to Mrs. Clise the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death. In the light of the *Hallock* case the transfers were “too much akin to testamentary dispositions not to be subjected to the same excise.” As we read the statute and understand the law of the *Klein* and *Hallock* cases, the Commissioner’s position here is well taken.

The court below cited two more Court of Appeals decisions in support of its conclusion, *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (C.A.3d), and *Commissioner v. Wilder's Estate*, 118 F. 2d 281 (C.A. 5th), certiorari denied, 314 U. S. 634. Both of these cases involve facts similar to those in the present case.

In the *Mearkle's Estate* case the Third Circuit said (pp. 387-388):

However, the question was so thoroughly discussed in the opinion of the Court in the *Clise* decision that it would smack of pedantry to repeat, so soon thereafter, an analysis of the problems dealt with in that opinion. We agree with that Court that the practical effect of such annuity contracts is to reserve to the annuitant the enjoyment of the property transferred and to postpone the fruition of the economic benefits to the second annuitant until after the death of the first, and that such transfers are " 'too much akin to testamentary dispositions not to be subjected to the same excise.' "

The executor argues in his brief that the annuity contracts are excludable from the decedent's gross estate under Section 7 of the Act of October 25, 1949, c. 720, 63 Stat. 891.² (Br. 7-25.) The brief states that Section 811 (c) of the Internal Revenue Code of 1939, as it read when the decedent died in 1947, required the inclusion in gross estate of joint and survivorship annuity contracts when the purchaser was survived by the other annuitant. (Br. 7.) While the brief does not state under what particular provision of the stat-

²Referred to by the executor as the Technical Changes Act of 1949. (Br. 7, 9.)

ute the inclusion is required,³ under the decision of this Court in *Commissioner v. Clise, supra*, they might have come under both the retained life estate provision (corresponding to Section 811 (c)(1)(B)) and the postponed enjoyment provision (corresponding to Section 811(c)(1)(C), *supra*). The brief of the executor practically concedes that if the decedent had retained a life interest in the contracts, they would be includible in her estate. The brief reads in part as follows (p. 9):

Admittedly, retained life interest transfers do not come within the exclusionary provision of paragraph (2) of sub-section (c) of Section 811 as added by the Technical Changes Act of 1949. If a particular transfer were a postponed enjoyment transfer which otherwise would qualify for exclusion from gross estate, it would be includable if it were also a retained life interest transfer. * * *

As pointed out above, this Court decided in *Commissioner v. Clise, supra*, that where the decedent purchased during her life a joint and survivor annuity and her husband survived her, *she had retained a life interest in the contracts*. In order to dodge the analysis of joint and survivor annuity contracts made by this Court in *Commissioner v. Clise, supra*, the executor treats the husband's contingent survivorship interest in the contracts as a separate transfer and argues that the decedent did not retain any life interest in the property transferred to her husband or the income therefrom. (Br. 13-25.) There is no evi-

³It may be noted that in the estate tax return the annuities were treated as jointly owned property. (R. 101-104.)

dence in the record to show that the various insurance companies would have written two separate contracts (one for the life of the decedent and one for the survivorship of her husband) at the time the decedent purchased the joint and survivor annuities, or that they would have done so without a medical examination of the decedent, or that she would have been able to pass such an examination. In this connection, it may be noted that all of the insurance companies which wrote the contracts made it clear that they would not have issued survivor annuities on the date of decedent's death. (R. 126, 128, 130, 132, 134, 136, 138, 141.) The joint and survivor contracts must be considered as one transfer, and cannot be broken down into separate parts in the absence of any evidence that the insurance companies would have written two separate contracts (one for the life of the decedent and one for the survivorship of her husband) at the same premiums charged for the joint and survivor contracts. Compare *Helvering v. Le Gierse*, 312 U. S. 531.

The executor argues that insofar as the decision of this Court in *Commissioner v. Clise*, *supra*, holds that the decedent retained a life interest in the annuity contracts, "it is in direct conflict with a *multitude* of other tax cases holding that the purchaser does not retain a life interest." (Br. 14.) Later on in the brief (p. 23), the executor qualifies this statement by saying that "Most, if not all, of these cases" are on all fours with the present case. We submit that none of them is on all fours with this case. *Hirsh v. United States*, 35 F. 2d 982 (C.Cls.) (Br. 16), involved a transfer

prior to 1931, and therefore prior to the time that the applicable Revenue Act contained a provision corresponding to Section 811 (c)(1)(B) of the Internal Revenue Code of 1939.⁴ The Supreme Court held in analogous cases that in the absence of such a provision the property which was the subject of the transfer was not includable in the gross estate. *May v. Heiner*, 281 U. S. 238; *Burnett v. Northern Trust Co.*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783; *McCormick v. Burnet*, 283 U. S. 784.

In *Commissioner v. Twogood's Estate*, 194 F. 2d 627 (C.A.2d) (Br. 17-18), it appeared that the employer paid most of the cost of the annuity and that the decedent during his life agreed to a reduced annuity in order to get a survivorship annuity for his wife; the court held that in such a case there was no reservation of a life estate. Here the decedent paid the entire cost of the annuity and was entitled to receive an annuity for her life. The case of *Estate of Bergan v. Commissioner*, 1 T. C. 543 (Br. 18-19), is materially different because it does not involve a survivorship annuity. Since in the case of a single life annuitant nothing in the annuitant's estate passes to another, there can be no estate tax and the question of retention of life interest is immaterial. Some of the cases cited by the executor turn on the question whether the insurance company which entered into the annuity contract was a trustee; inasmuch as it is not essential under Section 811(c)(1)(B) of the

⁴The same thing is true of *Pruyn's Estate v. Commissioner*, 184 F. 2d 971 (C.A. 2d), and *Morristown Trust Co. v. Manning*, 200 F. 2d 194 (C.A. 3d), certiorari denied, 345 U. S. 939. (Br. 9, 15.)

1939 Code that the transfer be in trust because of the words "or otherwise" which follow immediately after "by trust", and we are not here urging that the transfers to the insurance company were in trust, those cases too are not applicable.

We submit that the decision of this Court in *Commissioner v. Clise, supra*, that there is a retention of a life interest where a decedent purchased joint and survivor annuities and the annuities passed to the survivor is correct, that decisions of the Third and Fifth Circuits support the decision of this Court, and that there is no decision directly in conflict with the decision of this Court. The executor having conceded that Section 7 of the Act of October 25, 1949, is not applicable to retained life-interest transfers (Br. 9), the court below correctly decided that the annuities were includible in the gross estate.

II.

UNDER THE APPLICABLE TREASURY REGULATIONS THE VALUE TO BE PLACED UPON THE ANNUITIES FOR ESTATE TAX PURPOSES IS REPLACEMENT COST OF SINGLE LIFE ANNUITIES.

Under the terms of the various annuity contracts which the decedent purchased during her life, it is clear that her husband became entitled at her death to receive for the rest of his life annuities aggregating \$20,744.52 annually. (R. 38, 64-99.) The Treasury regulation relating to valuation of property in the gross

estate which applies in these circumstances is Section 81.10(i)(2) of Treasury Regulations 105, *supra*, providing as follows:

The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

In accordance with the above-mentioned regulation, the Commissioner obtained from each of the insurance companies the cost of a single life annuity for the decedent's husband in the same amount as in the contract purchased by the decedent during her life, as of March 2, 1947, the date of her death. The responses of the various companies relating to the cost of such contracts may be summarized as follows:

Aetna	\$ 8,045.16	(R. 106)
Aetna	24,137.47	(R. 106-108)
Connecticut General	33,583.11	(R. 109)
Sun Life Assurance	32,070.82	(R. 111)
Sun Life Assurance	32,894.75	(R. 113)
Pacific Mutual	17,746.00	(R. 115)
Pacific Mutual	9,562.00	(R. 116)
Metropolitan Life	4,393.81	(R. 117)
Metropolitan Life	13,181.42	(R. 119)
Connecticut Mutual	16,780.74	(R. 120)
Prudential Insurance . . .	16,110.85	(R. 122)
Prudential Insurance . . .	16,156.97	(R. 122)
Traveler's Insurance	16,226.90	(R. 124)
Traveler's Insurance	16,226.90	(R. 124)

Total Cost \$257,116.90⁵

⁵Since there is a discrepancy of only 30 cents between this figure and the total cost appearing in the record, namely, \$257,117.20 (R. 6, 13, 15, 35, 38, 39, 43, 45 etc.), we will use the latter figure because it was used by the court below.

The executor, in his brief and in the court below has not questioned the accuracy of the above-mentioned figures. Since at the decedent's death her husband alone became entitled to the annuities for the balance of his life, the annuities were comparable at that time to single life annuities, and, under the above-mentioned Treasury regulation, their value is \$257,117.20.

Mearkle's Estate v. Commissioner, 129 F. 2d 386 (C.A. 3d), involves facts similar to those in the present case. There the decedent during his life purchased annuity contracts payable to his wife and himself during their lives and, on the death of either, to the survivor. The husband died first and none of these contracts were included in his estate tax return. The Commissioner determined a deficiency on the ground that they were includable in the gross estate, and fixed the value at replacement cost for a single life annuity to the wife as of the date of the husband's death, in accordance with Article 10(i)(2) of Treasury Regulations 80 (1937 ed.), which corresponds to Section 81.10(i)(2) of Treasury Regulations 105, applicable to the present case. The Board of Tax Appeals upheld the Commissioner (*Estate of Mearkle v. Commissioner*, 45 B.T.A. 894), and the Third Circuit affirmed the decision of the Board. In its opinion, the Third Circuit said (pp. 388-389):

The valuation placed by the Commissioner, following the apposite Regulation, is the amount it would have cost to buy for the decedent's widow, on the day of his death, a similar annuity. It is now settled by final authority that for gift tax purposes, the value of a paid up life insurance

policy is the current cost of such policy at the time of the gift. *Guggenheim v. Rasquin*, 1941, 312 U. S. 254 * * *; *United States v. Ryerson*, 1941, 312 U. S. 260 * * *; followed by this Court in *Houston v. Commissioner of Internal Revenue*, 3 Cir., 1941, 124 F. 2d 518. * * *

* * *. There is no evidence in the record to show that the method of valuation adopted in the Regulations produces arbitrary results. It may well be that there are several methods of valuation which could be resorted to here, and that more than one of those methods would be reasonable. One is set out in the Regulations. They were compiled in accordance with the statute, and the general power to promulgate them, under statutory authority, is too well established to be seriously questioned. Quite obviously a Regulation prescribing a method for valuation is not to be stricken down by the taxpayer's preference for a different method. Valuation of life insurance policies when their transfer is subject to gift tax based upon cost at the time of the taxable event has been upheld in the cases already cited. While undoubtedly there are differences presented in the situation where the taxable event is the death of the first of two annuitants, we have not been shown facts which make the same method of valuation so arbitrary as to be contrary to law.

To the same effect, *United States Trust Co. of N. Y. v. Higgins*, 56 F. Supp. 997 (S.D.N.Y.). The Tax Court approved the ruling in *Mearkle's Estate v. Commissioner*, *supra*, in *Estate of Welliver v. Commissioner*, 8 T.C. 165, 172, and in *Estate of Walker v. Commissioner*, 8 T.C. 1107, 1111. The court below

remarked that the Tax Court came to different results in two later cases, namely, *Estate of Higgs v. Commissioner*, 12 T. C. 280, reversed, 184 F. 2d 427 (C.A. 3d), and *Estate of Twogood v. Commissioner*, 15 T. C. 989, 996, affirmed, 194 F. 2d 627 (C.A. 2d). (R. 44.) The two cases just mentioned involved annuities bought entirely, or at least principally, by employers; in both cases the employee elected to take a smaller annuity in order to obtain a survivorship annuity for his wife. In neither case did the Tax Court undertake to overrule its prior ruling in *Estate of Mearkle v. Commissioner*, *supra*; *Estate of Welliver v. Commissioner*, *supra*, or *Estate of Walker v. Commissioner*, *supra*.

The Court below did not hold that the Regulation was invalid (R. 47), but apparently held that there were no comparable contracts within the meaning of the Regulation. The opinion reads in part as follows:

But the regulation says value is to be established by "comparable contracts." If this means comparable in type, certainly the single life contract is not comparable to the survivorship contract. If it means comparable in value, neither the single life nor the survivorship contracts are comparable to what Mr. Grant now has. When there is no comparable contract, other methods of valuation must be resorted to.

That the Court was in error in holding that the annuity contracts which were transferred to the decedent's husband upon her death were not comparable at that time to single life annuity contracts is shown

by the actuarial certificate attached to the estate tax return which purports to value *single life annuity contracts* at \$160,399.45 (R. 103-104) and is the basis of the value found by the Court (R. 47). It reads in part as follows (R. 104) :

I certify that the above figures are the present values as of March 2, 1947, of an annual payment of \$1.00 for the lifetime of a person aged 67, the first payment being made on the date indicated, based on interest at 4% per annum and the Combined Experience Table of Mortality. I also certify that, according to the Combined Experience Table of Mortality, the Expectation of Life for a person aged 67 is 9.96 years.

The actuary's use of single life annuities as a comparable contract would seem to be correct, because that describes exactly the type of contract which was transferred to the decedent's husband upon the date of her death. At that moment he alone became entitled to annuities aggregating \$20,744.52 for the balance of his life. Therefore, the correct measure of what was transferred to him from the decedent within the meaning of Section 81.10(i)(2) of Treasury Regulations 105 is the cost of single life annuities in the same amounts obtained from the same companies which wrote the original contracts. This, as stated, is the method followed by the Commissioner.

Not only was the court wrong in holding that single life annuities were not comparable contracts, but the court found a value for the annuities which was clearly based upon single life annuities. (R. 103-104.)

Thus, in one breath the court below held that the annuity contracts which were transferred to the decedent's husband at her death were not comparable to single life annuities, and in the next breath it sanctioned a valuation based upon single life annuities under a different mortality table from that used by companies regularly engaged in selling annuity contracts, based upon a different rate of interest, and without considering any loading charge.

In connection with the Table A valuation of the annuities in the amount of \$160,399.45 which was based upon single life annuities it is interesting to note that the value of payments of \$1 as of March 2, 1947 (R. 104) varies in five instances from the figure opposite age 67 in column 2 of Table A. The last-named figure is \$7.21699, and it will be noticed that the actuarial computation uses that figure when the date of the first payment is March 2, 1948 (R. 104), which is exactly one year after the decedent's death. The other dates of first payments vary from March 28, 1947, to December 31, 1947, and the reason that the values are higher in those instances is that where the first payment of an annuity for the life of an individual is to be paid at once, the value is increased by the first payment (or \$1 is added to the figure in column 2 of Table A). (See paragraph 7 of Section 81.10(i) of Treasury Regulations 105.) Thus, where the first payment was due March 28, 1947, the value as of March 2, 1947, was given as \$8.14979, which is almost one dollar more than where the date of the first payment was March 2, 1948. (R. 104.)

Having thus shown that the Court below in fact based its valuation of the annuity contracts in question on single life contracts, it necessarily follows that the annuities in question were comparable to single life annuities. Therefore, the Court should have used replacement cost as the measure of value in accordance with the directions of paragraph 2 of Section 81.10(i) of Treasury Regulations 105. *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (C.A. 3d). Paragraph 2 deals expressly with annuity contracts, whereas paragraph 3 deals with "All other future payments". The impropriety of using paragraph 3 to value annuity contracts is illustrated by the fact that insurance companies do not employ the same table for writing life insurance policies that they use for annuity contracts; in practically every instance in which the insurance companies quoted prices on annuities they used annuity tables. (R. 65, 67, 70, 72, 79, 82, 85, 88, 96, 99, 122, 126, 128, 130, 132, 134, 136, 138, 141.) The record does not show what was the life expectancy of a man born January 1, 1880, as of March 2, 1947, according to any of the annuity tables; it merely shows an expectancy of 9.96 years under a mortality table, the Combined Experience Table of Mortality. (R. 104.)

In reaching the value of \$160,399.45 the actuaries employed an interest rate of 4%. (R. 103-104.) Plaintiff's Exhibit No. 17, on the other hand, shows that the insurance companies regularly engaged in selling annuity contracts used a rate between 2% and 3½%. (R. 126, 128, 130, 132, 134, 136, 138, 141.) Moreover,

the computation approved by the Court below shows no allowance for a loading charge, whereas the insurance companies which quoted a premium on surviving annuities took into consideration a loading charge of 6% to 10.885%. (R. 126, 128, 130, 132, 134, 136, 138, 141.) Furthermore, the Table A computation of \$160,399.45 did not consider any set-back in age (R. 103-104), whereas some of the insurance companies used a set-back of from one to three years. (R. 126, 130, 136, 138, 141.) Thus, it would seem that the Table A method of valuing the single life annuities for the decedent's husband as of the date of her death (the method used by the executor in filing a return for the estate and the method used by the Court below) differs substantially from the method used by companies regularly engaged in selling annuity contracts: (1) it uses a *mortality* table instead of an annuity table, and it is generally accepted that the latter shows a substantially longer life expectancy; (2) it uses a rate of interest much higher than that used by companies regularly engaged in selling such contracts, which results in a lower cost of the contract; (3) it fails to take into consideration any set-back in the age of the annuitant, whereas most of the commercial companies employ such a factor; and (4) it fails to take into consideration a loading charge, which is a substantial item in computing the premium fixed by commercial companies.

One of the reasons given by the court below for not considering the annuities transferred to the de-

cedent's husband at her death comparable to single life annuities, is that the income tax law in effect at the time of the decedent's death (presumably Section 22(b)(2) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 22) required the husband to report as income 3% of \$390,000 (the original cost of the annuities to the decedent (R. 38)) as income each year.⁶ If the Commissioner's valuation of the annuities were controlling, the court reasoned, the husband would have to pay 3% of only \$257,117.20, which would be about \$4,000 less than he actually included in his gross income. (R. 45.) The court infers that since the husband is not given the benefit of the \$4,000 deduction in his income tax, the annuity contracts which were transferred to him are not comparable to those previously enjoyed by the decedent and him during her life. This reasoning is not sound because there is no necessary relationship between the income tax treatment of annuities and the estate tax. If there were such a relationship, it might be argued that the annuities in the decedent's estate should be valued at \$390,000, because they are valued at that figure for income tax purposes. But the estate tax requires the value to be computed as of date of death, and not at original cost. Furthermore, later income tax provisions made changes in the taxing of annuities. Section 303(b) of the Revenue Act of 1951, c. 521, 65 Stat. 452, added a sentence to Sec-

⁶See *MacArthur v. Commissioner*, 168 F. 2d 413 (C.A. 8th).

tion 113(a)(5) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 113) to provide, in effect, that if the value of a survivorship annuity is required to be included in the gross estate, and the decedent died after December 31, 1950, the survivor's base should be equal to fair market value at death. Section 303(a) of the Revenue Act of 1951 added subdivision (C) to Section 22(b)(2) of the Internal Revenue Code of 1939 to provide, effective for years after 1950, that if the basis is determined under Section 113(a)(5), the consideration paid (to which the 3% would be applicable) should be deemed to be equal to the basis to the survivor. Since these legislative changes do not even purport to determine what value is to be included in the gross estate, the lower court was plainly wrong in thinking that the income tax consequences to the survivor have a bearing on what value is to be included in the gross estate.

Furthermore, the method of taxing income in the form of annuities was changed again in the Internal Revenue Code of 1954; Section 72 thereof permits the annuitant to recover tax-free in each year of his life an amount equal to the cost of the annuity divided by his life expectancy. Here again there was no change in the estate tax provisions to correspond to the change in the income tax law.

Another factor that influenced the court below to determine that single life annuities were not comparable to what was transferred to the decedent's husband at her death is that the husband "would have

to live about thirteen years after his wife's death to recover his principal if the government's valuation were used." (R. 46.) The court remarked that this was about 30% greater than his life expectancy at the time of the decedent's death. (R. 46.) The court undoubtedly had in mind a life expectancy of 9.96 years, which was computed under the Actuaries' or Combined Experience Table of Mortality. (R. 35, 104.) The court overlooked the fact that this table is used for life insurance purposes, not for annuity purposes. As pointed out above, the insurance companies which issued the contracts in question all used annuity tables, not life insurance tables, and it is generally accepted that the annuity tables show a greater life expectancy than the life insurance tables. This record does not show what is the life expectancy of a man of 67 years under the annuity tables; but since it does show that the cost of single life annuities computed by companies regularly engaged in selling such contracts to be substantially greater than the figure obtained by the actuaries using the Combined Experience Table of Mortality, it may be inferred that the life expectancy under the annuity tables was substantially greater.

One of the points raised by the executor in his appeal from the decision of the court below is that the annuities which passed to the decedent's husband at her death are survivorship annuities and that the aggregate cost of such annuities on the date of the decedent's death would be \$60,980.72. (Br. 25-39.)

The evidence to support this valuation is Plaintiff's Exhibit No. 17 (R. 125-141), which consists of a series of letters from the various insurance companies which wrote the original contracts giving their estimates of the cost of survivorship annuities. It may be noted that in all but one instance they expressly state that due to the state of the decedent's health on March 2, 1947, they would not have issued such policies in the present case. (R. 126, 128, 130, 132, 134, 136, 141.) In the remaining instance, the company wrote that "the female would have to pass a satisfactory medical examination in order to have such a contract issued." (R. 138.) In view of the fact that the insurance companies would not have written a survivorship policy on March 2, 1947, the date of decedent's death, the court below was clearly correct in rejecting this method of valuation.

Actually it is unnecessary for this Court to pass upon this point, namely, a valuation of \$60,980.72, because the executor is barred by limitations from recovering more than the amount of the deficiency paid on September 22, 1950. (R. 38-39; Br. 6-7.)

CONCLUSION.

The part of the decision below which holds that the annuity contracts should be included in the decedent's gross estate is correct; the part which holds that the value to be placed upon the annuity contracts

is \$160,399.45, and not \$257,117.20, is wrong and should be reversed.

March, 1955.

Respectfully submitted,

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No. 14,549

In the

United States Court of Appeals

For the Ninth Circuit

SPENCER GRANT, Executor of the Last Will
and Testament of Blanche Kelleher
Grant, Deceased,
Plaintiff-Appellant and Appellee,

vs.

JAMES G. SMYTH, former Collector of
Internal Revenue,
Defendant-Appellee and Appellant.

Closing Brief for Plaintiff-Appellant and Appellee Spencer Grant

Appeals from the United States District Court for the Northern District
of California, Southern Division

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of California, Southern Division

INTRODUCTION

Plaintiff (executor) filed an opening brief in his cross-appeal. Defendant (ex-Collector) thereafter filed a consolidated brief in both cross-appeals in which he replied to

plaintiff's opening brief (Def. Brief 9-16, 27-28) and argued his own cross-appeal (Def. Brief 16-27). Therefore, this present brief is also filed in consolidated form.

INTER VIVOS CHARACTER OF TRANSFER

Mrs. Grant's purchase of the annuity contracts in 1938 and 1939 resulted in completed lifetime or *inter vivos* transfers in those years. It is elementary that no testamentary transfer is involved in this case—that no transfer of any kind occurred at her death. Plaintiff as survivor simply began to enjoy for the first time the benefits of the prior transfers. The property transferred (contingent survivorship contract rights) had irrevocably passed to him at the time of purchase of the annuity contracts. This is why 1939 Code 811 (c), which deals only with *inter vivos* transfers, controls. Defendant concedes this.

However, throughout his brief, including his "Questions Presented," "Statement of Points," "Summary of Argument" and continuously thereafter, he seeks to escape from the consequences derived from the fact that only a lifetime transfer is involved. He does so by reiterated reference to "the annuity contracts *acquired by the husband at the decedent's death*," "the annuity contracts *which were transferred upon the death of the decedent*," "the annuities *which passed to the decedent's husband at her death*." This is nothing but artificial coloring and only emphasizes how unpalatable defendant finds the *inter vivos* nature of the transfer for his purposes. Of course, if we were dealing with a transfer testamentary in character, there might be merit in defendant's contention that single life contracts are comparable for valuation purposes. But we are not—and defendant's persistent cloud-seeding efforts cannot wash that fact away.

STATUTES AND REGULATIONS INVOLVED

A. Bearing on "excludability" issue:

*Section 811,
1939 Internal Revenue Code*

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

(c) (As amended by Sec. 7(a) of Technical Changes Act of 1949—63 Stat. 891) *Transfers in Contemplation of, or Taking Effect at, Death.*

(1) *General Rule.* To the extent of any interest therein of which the decedent has at any time made a transfer * * * by trust or otherwise

(A) in contemplation of his death * * *; or

(B) under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property * * *; or

(C) intended to take effect in possession or enjoyment at or after his death.

(2) *Transfers taking Effect at Death—Transfers Prior to October 8, 1949.*—An interest in property of which the decedent made a transfer on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this sub-section unless the decedent has retained a reversionary interest in the property * * *.

*Technical Changes Act of 1949
(63 Stat. 891)*

SEC. 7. TRANSFERS TAKING EFFECT AT DEATH.

* * * * *

(b) The amendment (of Sec. 811(c) I. R. C.) made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of Section 811(c) of the Internal Revenue Code, as amended by Subsection (a), shall * * * apply to transfers made on, before, or after February 26, 1926 * * *.

B. Bearing on "valuation" issues:

*Section 22(b),
1939 Internal Revenue Code*

SEC. 22. * * * (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(2) *Annuities, etc.*

(A) *In General.*—* * * Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income * * * equals the aggregate premiums or consideration paid for such annuity * * *.

Treasury Regulations 105.

SEC. 81.10. VALUATION OF PROPERTY.—(a) General.—* * * All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

* * * * * * *

(i) *Annuities, life, remainder and reversionary interests.*—

* * * * * * *

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday.

ARGUMENT

I. The Annuity Contracts Were Excludable from Mrs. Grant's Gross Estate Under the Technical Changes Act of 1949.

This proposition was developed in the opening brief in plaintiff's cross-appeal (Pf. Br. 7-25). Defendant's answer distills into two parts: (1) The *Clise* decision by this Court controls in holding that the purchaser of a joint and survivor annuity contract retains a life interest in "the property transferred" to the survivor-annuitant and (2) the contrary decisions cited by us (Pf. Br. 16-23) are not in point.

Our opening brief speaks for itself with respect to the *Clise* case in which this Court was not advised by counsel there of the many contrary decisions. We ask only that one of the two alternative grounds for decision there be held inapplicable here.

The contrary decisions cited by us are not distinguishable. *Hirsh v. United States*, 35 F.2d 982 (Ct. Cl. 1925) is apposite. The case did involve the question whether there was a retained life interest transfer (p. 985):

“The sole question remaining in the case is whether after this transfer to his children (in exchange for a single life and survivorship annuity contract) the decedent retained any interest in the securities so transferred * * *.”

The court concluded that he did not.

In *Commissioner v. Twogood's Estate*, 194 F.2d 627 (C.A. 2-1952), the court said (p. 629):

“* * * no life interest was retained by the decedent * * *, in no sense can it be said that the payments the decedent received (in his lifetime) were derived from any retained interest in what his then wife might receive (if she survived) * * *.”

In *Estate of Bergan v. Commissioner*, 1 T.C. 543 (1943), a single life annuity contract was involved. The Commissioner argued that the annuitant retained a life interest because in effect the annuity payments were for the support of the annuitant, but the Tax Court held that no interest was retained. Defendant says this case is not in point because “in the case of a single life annuitant *nothing in the annuitant's estate passes* to another.” This is only more artificial coloring unwarranted by the record. The elemental fact is that *nothing “passed” or was transferred to plaintiff on Mrs. Grant's death, either.* The transfer to him was *inter vivos* and took place years before her death. The *Bergan* and several of the other cases cited by us squarely hold that the purchaser of a single life annuity *for her own benefit* retains no life interest. Then, how in reason can it consistently be said that the purchaser of a survivorship annuity *for the benefit of another* (whether or not coupled with a single life or joint life annuity) does retain a life interest?

Defendant says that the cases holding that an insurance company issuing an annuity contract is not a trustee are not in point because he does not urge that the insurance companies here were trustees. We cited those cases because they cannot be reconciled with the alternative basis for decision in *Clise*, to wit, the view there expressed that in effect Mrs. Clise had created a trust fund and reserved a life interest "with the remainder over."

We respectfully submit that the numerous decisions cited by us—which are only a representative selection—and of which this Court was not advised at all by counsel in the *Clise* case—cannot be rationalized with the alternative basis for decision in that case.

II. The Annuity Contracts Had a Value of \$60,980 Which Was the Date of Death Cost of Comparable or Survivorship Contracts.

This proposition was developed in the opening brief in plaintiff's cross-appeal (Pf. Brief 25-39). Defendant's answer (Df. Br. 27-28) is confined to the sole point that survivorship contracts are not comparable because on the day of Mrs. Grant's death the insurance companies would not have sold survivorship contracts to her.

Here, we wish to remark parenthetically that medical examinations are not required of purchasers of annuity contracts; however, if an insurance company knows that the purchaser has an incurable disease likely to prove fatal before he lives out his life expectancy, it will refuse to issue a contract because it would be unfair to the purchaser-annuitant in the case of a single life contract and unfair to the company in the case of a survivorship contract. See *Denbigh v. Commissioner*, 7 T.C. 387, 388 (1946).

Now, as we said in plaintiff's opening brief (p. 36-37), the fact that Mrs. Grant could not have purchased survivorship

contracts on the date of her death is completely beside the point. The "comparable contract" regulation says that value "is established through the sale by (the same) company of comparable contracts." It does not say that the sale must be to the decedent or even that the company must have been willing to sell to the decedent up to the moment of death. The test plainly intended—and the only rational one—is what would the cost have been to *any* qualified purchaser. The record establishes that on March 2, 1947, the aggregate cost of survivorship contracts to *any* qualified purchaser was \$60,980 (R. 125-141).

It was shown in plaintiff's opening brief that single life contracts are an entirely different kind of thing from survivorship contracts, that only survivorship contracts are comparable to the Grant survivorship provisions from an actuarial or cost standpoint, and that the taxpayer was sustained in both cases in which the issue was raised (*Higgs* case, 12 T.C. 280, and *Twogood* case, 15 T.C. 989). In our view, defendant has made no defense at all on this issue, and we find it significant that the Commissioner did not appeal in either *Higgs* or *Twogood*.

We do not comprehend in the least defendant's closing sentence (Df. Br. 28) that it is unnecessary for this Court to pass on this issue "because the (plaintiff) is barred by limitations from recovering more than the amount of the deficiency paid on September 22, 1950." It was stipulated at the trial (R. 62-63) that if plaintiff should prevail on this survivorship contract valuation issue, he should have judgment for an overpayment of \$29,397.68, this being the full amount of the deficiency payment. Thus, it is decidedly necessary for this Court to pass on this issue even though recovery of any greater amount is barred by limitations.

III. Single Life Contracts Are Not Comparable from an Economic Benefit Standpoint Because of Their Much More Favorable Income Tax Treatment.

Coming now to defendant's cross-appeal, we have no quarrel with the underlying philosophy of the "comparable contract" valuation regulation. However, the date of death single life contracts relied on by defendant are not comparable to the Grant contracts for two reasons. *First*, single life contracts are not comparable from an actuarial or cost standpoint—but survivorship contracts are—as demonstrated in the preceding subdivision of this brief; *second*, single life contracts are not comparable from an economic benefit standpoint and, because of much more generous income tax treatment, have much greater value than the Grant contracts.

A. THE DATE OF DEATH SINGLE LIFE CONTRACTS ENJOY A MUCH MORE FAVORABLE INCOME TAX STATUS THAN THE GRANT CONTRACTS.

This readily appears from the income tax consequences of Section 22(b)(2)(A) of the 1939 Internal Revenue Code (see page 4 of this brief). Ever since the Revenue Act of 1934 and until the Revenue Code of 1954, the holder of an annuity contract has been required to include in taxable income each year an amount equal to 3% of the *original consideration* paid for the contract.*

When we apply this 3% income tax rule to the Grant contracts, we find that of the \$20,774 paid to plaintiff each year he has had to return and pay tax on \$11,700 (3% of the original cost of \$390,000): this leaves him only \$9,074 *as tax-free return of capital each year*. However, when we

*The 1951 amendment of Section 22(b)(2) of the 1939 Code substituted the estate tax valuation for the original consideration for purposes of this 3% rule but this amendment was applicable only in the case of post-1950 estates.

apply the 3% income tax rule to the single life contracts relied on by defendant we find that of the same \$20,774 payable under those contracts each year the purchaser would return and pay tax on only \$7,713 (3% of the 1947 date of death cost of \$257,117). This would leave the holder of the date of death single life contracts with *\$13,061 as tax-free return of capital each year* or virtually \$4,000 more in tax-free return of capital per year than plaintiff receives under the Grant contracts.

This is far more significant when we note that plaintiff would have to live to the very ripe age of 96 to recover tax-free the capital value of \$257,117 placed on the Grant contracts by defendant, whereas a holder of the date of death single life contracts costing exactly the same amount would fully recover his capital investment tax-free at the age of 86 under the 3% rule. The consequence of this difference is further magnified in light of the fact that plaintiff's life expectancy was only 9.96 years on March 2, 1947 (R. 35), which would take him only to the age of 76 years in any case. In other words, it would take almost 50% again as long for plaintiff to get back the capital value placed by defendant on the Grant contracts as it would under the date of death single life contracts.

The \$4,000 per year greater tax-free return of capital under the single life contracts is a substantial and differentiating factor. It is one of the relevant facts and elements of value to be considered consistently with the Commissioner's own regulation to that effect (Reg. 105, Sec. 81.10(a)):

"All relevant facts and elements of value as of the applicable valuation date should be considered in every case."

The full weight of this tax factor appears when it is realized that during plaintiff's almost 10 year life expectancy, the single life contracts would return about \$40,000 more tax-free capital than the Grant contracts under the 3% rule and that this would increase to \$75,000 at age 86 and to \$115,000 at age 96.

Is it possible that defendant doubts that the value of a tax-free dollar is greater than the value of a taxable dollar? After income tax exemptions, deductions and credits, a tax-free dollar is currently worth at least 20% more than a taxable dollar. This is reflected in the relatively greater market value of tax-exempt municipal bonds as contrasted with otherwise comparable corporate bonds. The net effect of the 3% rule in this case is to give annuities paid under the date of death single life contracts an annual \$4,000 tax exemption which the Grant annuities do not have.

Defendant's claim that single life contracts are comparable to the Grant contracts ignores this difference in income tax treatment of the annuity payments. However, because of this difference, it cannot be said that the single life contracts are comparable for valuation purposes. No one in his right mind, not even a tax collector, would pay \$257,000 for an annuity contract which would give him a tax-free return of capital of only \$9,000 per year (as under the Grant contracts) if he could pay precisely the same amount for an otherwise identical contract except that it would give him a tax-free return of \$13,000 per year (as under the date of death single life contracts). Defendant's valuation basis completely disregards this vital difference in economic results and cannot be sustained under the authorities.

In valuing annuity contracts as well as other property interests, *all* relevant and material facts must be considered

and none may be singled out or disregarded. For example, in *Denbigh v. Commissioner*, 7 T.C. 387 (1946), the Tax Court rejected the Commissioner's argument that in valuing the Denbigh annuity contracts no weight should be given to medical testimony that the surviving annuitant would not live more than one or two years where she had a 12 year life expectancy under standard mortality tables. The Court said that

"Such tables are only evidentiary and they need not be controlling.

* * * * *

"The question is, What was the value of these particular contracts on July 12, 1943? Sec. 811, Internal Revenue Code. All facts material thereto may, indeed must, be considered."

More specifically as applied to our case, it has been held that *all of the economic benefits* of an annuity contract must be considered in valuing it for tax purposes. See *Commissioner v. Edwards*, 135 F.2d 574 (C.A. 7-1943), which affirmed 46 B.T.A. 814. This case involved gift tax and the question for decision was what value should be placed on the annuity contracts which comprised the gifts. They were not joint and survivorship contracts but were single life contracts which included provisions for guaranteed refund and cash surrender privileges. The donor had purchased the contracts in 1934 and donated them in 1936. The Commissioner argued that the value of the contracts for gift tax purposes was what it would have cost on the date of the gift to have purchased "comparable" contracts from the same company. However, the evidence showed that the insurance company which had issued the contracts had changed the basis for computing the cost of such contracts. As a result of the changed cost basis, the guaranteed refund and cash sur-

render benefits were relatively more valuable under the 1936 contracts to the extent of about \$43,000 and \$27,000 respectively. On this showing, the court held that the cost of the 1936 contracts was not a fair measure of the value of the donated 1934 contracts and said (p. 576) :

“All of the economic benefits of a policy must be taken into consideration in determining its value for gift-tax purposes. To single out one and to disregard the others is in effect to substitute a different property interest for the one which was the subject of the gift.’ *Guggenheim v. Rasquin*, 312 U.S. 254, 257, 61 S.Ct. 507, 509, 85 L.Ed. 813. Inasmuch as it appears from the evidence that various substantial rights and economic benefits were included in the policies suggested by the commissioner for comparison, which were not embraced in the contracts transferred, we think the court rightfully concluded that the factors of the allegedly ‘procurable contracts differentiate them unmistakably from the contracts under consideration.’ The value could not be established by consideration of comparable contracts for the simple reason that no comparable contract was procurable.”

Certainly, there can be no question—and defendant does not deny—that under the 3% income tax rule the economic benefits under the Grant annuity contracts are substantially less than under the date of death single life contracts. We have seen that a purchaser of the 1947 single life contracts would enjoy the equivalent of an annual \$4,000 tax exemption to which plaintiff is not entitled under the Grant contracts. Obviously, anyone would be willing to pay more for the single life contracts than for the Grant contracts on an open market. This means that the single life contracts, being more valuable, are not comparable so that their cost does not establish the March 2, 1947 value of the

Grant survivorship contracts and the Court below correctly so concluded (R. 45).

The 1954 Revenue Act abolished the 3% income tax rule and substituted a much more fair basis for taxing annuity payments (1954 Code 72). This change, in recognition of the harsh effect of the former 3% rule (which generally operated to prevent the annuitant from fully recovering even his purchase price during his life expectancy), does away with the difference in income tax treatment present in the instant case. However, the 1954 Code change has no bearing on the 1947 value of the Grant contracts for two reasons. In the first place, the date of death single life contracts relied on by defendant were entitled to the equivalent of an aggregate \$28,000 tax exemption benefit not given to plaintiff during the seven years between Mrs. Grant's death and the adoption of the 1954 Code; in the second place, value at death must be determined in the light of circumstances then existing.

Defendant's Contentions Are Untenable.

Defendant suggests two closely related reasons for disregarding the substantial difference in income tax benefits in determining comparability for valuation purposes (Df. Br. p. 25-26). Both are patently specious.

Defendant's first point is that "there is no *necessary* relationship" between income tax treatment and estate tax treatment of annuities and, if there were, it might as well be argued that the Grant contracts should be valued at \$390,000 "because they are valued at that figure for income tax purposes." In the first place, they are *not* valued at that figure for income tax purposes. That figure is the 1938-1939 *cost basis* figure and is not a "valuation" figure in the remotest sense. It would not even be a relevant factor in determining value eight years later in 1947.

In the second place, while there may be no *necessary* relationship between income tax law and estate tax law as a general rule, nevertheless tax consequences or other statutory burdens are always relevant factors in valuation cases. The impact of a tax statute as an element of value in a particular case cannot be dismissed and we have already mentioned the commonplace example of tax-exempt municipal bonds. For another example, the value of an article of jewelry for gift tax purposes includes not only the price but also the federal excise tax paid by the donor. Thus, in a very recent Revenue Ruling (Rev. Ruling 55-71, I.R.B. 1955-7, p. 8), taxpayers are advised by the Treasury that in determining fair market value for estate and gift tax purposes,

“* * * all relevant facts and elements of value as of the applicable valuation date should be considered.

* * * * *

“The existence of the Federal excise tax on jewelry, furs, and other related articles of personal property sold by dealers, is an item which will tend to increase the amount at which an individual or an estate would be willing to sell such property. It is an element which affects the general market for that type of property.

“In view of the foregoing, it is held that *the Federal excise tax* on jewelry, furs, and related articles of personal property *is a relevant factor* which should be considered in determining the fair market value of such property *for Federal estate and gift tax purposes.*” (Our emphasis)

Evidently, the Treasury is quite able to find a necessary relationship between different tax statutes when it suits the Treasury's own valuation purpose.

For an analogous example, the market value of requisitioned property cannot exceed the statutory ceiling price,

as held in *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950).

In *Old South Association v. City of Boston*, 99 N.E. 235 (Mass. 1912), the court held that the tax-exempt status of land owned by a charitable organization was an element of value to be considered in measuring the city's liability in a condemnation case.

Defendant's second and final point made in trying to escape the force of the 3% income tax rule is that neither the 1951 amendment of the 3% rule nor the recent 1954 Code provision (Sec. 72) abolishing the 3% rule and substituting a fairer income tax treatment for annuities "even purport to determine what value is to be included in the gross estate." We find it difficult to dignify this with any reply. Suffice it that there is no reason why they should; they deal with different matters on the surface. But this does not mean that the consequences of such dealing are to be ignored. Defendant is here simply putting in another guise the "not in *pari materia*" contention he made below which the recent Revenue Ruling and other valuation authorities cited above show to be only a phantom.

Defendant admits—as he must—the fact of the greater income tax burden on the Grant annuities. Hence, he cannot conscientiously deny that single life contracts are more valuable. No sane purchaser offered a choice of either the Grant contracts or the single life contracts for \$257,000 or any other amount would ever choose the Grant contracts. Defendant's sole defense, to wit, his suggestions that there is no "necessary" relationship between estate and income tax statutes and that the income tax statute does not "purport" to define value for estate tax purposes, is tantamount to a plea of *nolo contendere*.

B. BECAUSE OF SUBSTANTIALLY DIFFERENT INCOME TAX TREATMENT, IT APPEARS THAT NO DATE OF DEATH CONTRACTS OF ANY KIND WERE COMPARABLE TO THE GRANT CONTRACTS.

Defendant argued below that if difference in income tax treatment is to be taken into account, then not only are date of death single life contracts more valuable than the Grant contracts but date of death survivorship contracts are even more valuable (because, with a cost of only \$60,980, only \$1,820 would be taxable each year under the 3% rule in the case of survivorship contracts instead of \$7,710 in the case of the single life contracts and \$11,700 in the case of the Grant contracts). Defendant said that because date of death contracts offered for comparison with a decedent's contracts always would have a better income tax status under the 3% rule, this would create "a hopeless dilemma" because there never could be a comparable date of death contract in any case. Before conceding the apparent truth of this and showing that the lower Court found the correct valuation solution, we wish to digress.

In the first place, this is the first occasion on which the 3% income tax point has been presented to any court in any annuity contract valuation case. We base this assertion on our examination of every reported federal valuation decision involving annuity contracts and of the briefs in most of the cases and on correspondence with attorneys for the taxpayers. We find that in every instance the point was overlooked and we are calling the matter to this Court's attention, as we did below, so that the Court will be informed that it is a case of first impression. Being a case of first impression, the *Mearkle* and other decisions cited by defendant on pages 18-19 of his brief are no precedent. Defendant quotes from *Mearkle*, including the court's observation that "There is no evidence in the record" indicating that the use of single life contracts produced arbitrary results (Df. Br.

19). The decision is no precedent whatever because the court there and in the other cited cases was not shown that the different income tax treatment under the 3% rule does operate to produce an arbitrary and unreasonable result. The point was simply overlooked by both court and counsel.

In the second place, we do not maintain that the comparable contract basis of valuing annuities is controlling here but only that, if it is—not in theory but in operative fact—then only survivorship contracts are comparable from an actuarial or cost standpoint and single life contracts are not. However, in the course of developing the income tax point, we became aware that it excluded not only single life contracts as a basis for comparison but also excluded survivorship contracts. It finally became and remains our own carefully considered conviction that the income tax point is thoroughly sound and in truth does impeach the use of any type of date of death contract for comparative purposes in the case of pre-1951 estates. This is because the cost of either survivorship or single life contracts on date of death would always be lower than original cost of the decedent's contracts (due to reduction of the surviving annuitant's life expectancy) so that *any* date of death contract invariably would have an inherent built-in tax advantage under the 3% income tax rule.

In the third place, the 1951 amendment of 1939 Code 22 (b)(2) and the enactment of Section 72 of the 1954 Code operate to eliminate the difference in income tax consequences in the case of all decedents dying after 1950 so that plaintiff's "3% rule" contention can have no significant effect on the revenues.

Finally, there is no absolute sanctity in any Treasury regulation and when a particular valuation regulation produces an arbitrary and unreasonable result, as the commis-

sioner's misuse of the comparable contract basis does in this case, it will receive judicial condemnation:

Maass v. Higgins, 312 U.S. 443 (1941);

Helvering v. Safe Deposit & Trust Co., 95 F. 2d 806 (CA4-1938);

Commissioner v. Shattuck, 97 F. 2d 790 (CA7-1938).

With this digression, we turn now to the solution of the apparent dilemma created by the lack of any comparable date of death contracts.

C. THE COURT BELOW CORRECTLY DETERMINED THE VALUE OF THE GRANT CONTRACTS TO BE \$160,399.

Section 81.10(i)(3) of Regulations 105 as applicable in 1947 (set out on page 5 of this brief) provides in effect that, in the absence of comparable contracts, the value of a decedent's contracts is to be determined on a discounted present worth basis, using a 4% interest rate and the survivor's life expectancy obtained from the Actuaries or Combined Experience Table of Mortality (known as the "Table A" valuation basis). This is the basis, consistently, which plaintiff used to compute the returned value shown in the estate tax return as filed (R. 28-29). This is the valuation basis used by the Court below after it concluded that no comparable date of death contracts were available (R. 47).

There is nothing at all unique in this solution. The Commissioner regularly uses this Table A formula to value every annuity contract (including annuity contracts issued by charitable organizations, business corporations and individuals) except one issued by an insurance company. For example, if one of the Grant contracts had been purchased from Harvard University—or Pomona College—the Commissioner would have accepted the returned value for it.

Obviously, an annuity dollar is the same whether paid by Harvard University or Annuity Insurance Company. It makes no real sense to value a contract issued by the former at \$160,399 and an identical contract issued by the latter at \$257,117 as the Commissioner has done here. So there is not any "impropriety" in applying the Commissioner's own actuarial or Table A valuation basis to the Grant contracts in the absence of any comparable date of death contracts. There should also be some salve for defendant in the fact that under the 3% rule plaintiff, despite the expectancy on March 2, 1947 that he would live to be only 76 (R. 35), actually would have to live to be 85 before full capital recovery of even the \$160,399 valuation amount!

Defendant is critical because the record does not show plaintiff's life expectancy under "any of the annuity tables" but only shows an expectancy of 9.96 years under the Combined Experience Table of Mortality (Df. Br. 23). A "mortality table" is an actuarial basis for ascertaining the probable number of years a person of a given age and of ordinary health will live: *Butler v. Butler*, 230 N.W. 575, 579 (Minn. 1930). Defendant's criticism seems misplaced inasmuch as he not only *stipulated* to plaintiff's life expectancy under the Combined Experience Table (R. 35) but this table also is the very table prescribed by the Commissioner for determining life expectancy in computing the value of all annuity contracts where no "comparable" contracts are obtainable, as well as the value of all life estates and remainders (Reg. 105, Sec. 81.10(i)(3)).

D. THE VALUATION OF \$160,399 WAS NOT BASED ON SINGLE LIFE CONTRACTS.

Defendant flatly asserts that in using the Table A actuarial valuation basis prescribed by Regulations 105 (Sec. 81.10(i)(3)), the lower court "sanctioned a valuation based

upon single life annuities" (Df. Br. 21-24). We respectfully suggest that the argument as apparently made is in derogation of the record, smacks of the superficial and borders on the frivolous.

The sole "premise" for this flat assertion is found on page 21 of his brief where defendant, without explanation or reason, simply posits that

"the actuarial certificate attached to the estate tax return * * * purports to value *single life annuity contracts* at \$160,399.45 (R. 103-104) and is the basis of the value found by the Court (R. 47)."

This is without any foundation constructed by defendant or which can be discovered by logical analysis.

The truth is that the value of \$160,399 determined by the lower Court and also by the actuaries in their certificate was the value based on application of the discounted present worth formula prescribed in the Treasury Regulations for use when no comparable contracts are obtainable. The actuarial certificate itself is captioned (R. 28) "Valuation of joint and survivor annuities under Table A of Regulations 105," coupled with use of the age, interest and mortality table factors specified in the Regulations. Also, the lower Court's findings and conclusions recite (R. 39, 47):

"If there are no comparable contracts, it is stipulated that they should be valued on an actuarial valuation which is stipulated to be \$160,399.00, and plaintiff should recover \$28,603.43. (This is the valuation used in the estate tax return.)

* * * * *

"The Court concludes therefore that the true value of the annuity contracts as of the date of Mrs. Grant's death is represented by the Actuaries or Combined Experience Table of Mortality and established actuarial principles as set out in Treasury Regulation 105,

Section 81.10(a)(i)(3). * * * This value has been stipulated to be \$160,399.45. * * *."

In his own Statement of Facts in his brief filed with the lower Court, defendant stated:

"The annuity contracts were included in the estate tax return (filed) by plaintiff at a total of \$160,399.45, being the commuted value of the annuities payable to plaintiff using a 4% interest rate and Mr. Grant's then life expectancy of 9.96 years under the Combined Experience Table of Mortality."

There is not one iota of support in the record for any notion that the \$160,399 valuation is "based on single life annuities."

However, having leaped somehow to this fallacious premise, defendant then proceeds to urge that the Table A formula set out in the Regulations uses different factors than insurance companies use in computing replacement costs of single life contracts and gives a lower value than such replacement costs; that because the Table A formula valuation is "based on single life annuities, it necessarily follows that the annuities in question were comparable to single life annuities." If we understand this twist (and, frankly, we are not sure), it would apply to any annuity contract being valued under the Table A formula with the positively weird result that in any case where there were no comparable date of death contracts, value should always be determined not under Table A, after all, but by replacement cost of single life contracts even though they are not comparable.

To approach it from another side in a sincere effort to perceive whether defendant's depiction is more than still life, it seems to us that defendant is trying to use a syllogism which goes about as follows:

- (1) Having found that no comparable contracts were obtainable, the lower Court followed the prescribed alternative or Table A valuation basis and valued annual payments to plaintiff for life in accordance with such basis.
- (2) A single life annuity contract calls for annual payments for life.
- (3) Therefore, the Court "based its valuation on single life contracts" so that "it necessarily follows that the annuities in question were comparable to single life annuities" so that single life replacement cost should have been used instead even though single life contracts are not comparable.

The most we can say of this, if it supplies the steps with which defendant has not favored us, is that it sounds like the horrible example in any course in basic logic: A cow has four legs; a horse has four legs; therefore, a cow is a horse.

This brings us back to the track we were on: No date of death contracts are comparable from an economic benefit standpoint under the 3% income tax rule; therefore, the lower Court correctly valued the Grant contracts at \$160,399 in accordance with the discounted present worth basis prescribed in the Regulations for all annuity contracts when comparable ones are not obtainable.

CONCLUSION

First, the Grant contracts were excludable from gross estate under the Technical Changes Act of 1949 because Mrs. Grant retained no life interest in the contingent survivorship contract rights transferred to plaintiff at the time of purchase.

Second, single life contracts take no account of the survivorship feature of the Grant contracts and therefore constitute a different kind of property from an actuarial or cost standpoint; if the comparable contract basis is applicable in this case, only survivorship contracts are comparable.

Third, the much more generous income tax treatment of date of death contracts under the 3% rule forces the conclusion that date of death single life contracts are not comparable for this further reason; if, as we would agree and as the lower Court concluded, this differentiating factor also is present in the case of date of death survivorship contracts, no date of death contracts are comparable; it follows that the Grant contracts were correctly returned at their discounted value of \$160,399 which is the value found by the Court below.

Respectfully submitted,

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No. 14,549

IN THE

United States Court of Appeals
For the Ninth Circuit

SPENCER GRANT, Executor of the Last
Will and Testament of BLANCHE
KELLEHER GRANT, Deceased,

Appellant and Appellee,

vs.

JAMES G. SMYTH, Former Collector of
Internal Revenue,

Appellee and Appellant.

On Appeals from the Judgment of the United States
District Court for the Northern District of California.

REPLY BRIEF FOR THE COLLECTOR.

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REPLY BRIEF FOR THE COLLECTOR.

While we do not deem it necessary to reply to all the arguments made in the Closing Brief for Spencer Grant, it may clarify our position if we answer some of the arguments.

1. On page 2 there are statements that Mrs. Grant's purchase of the annuity contracts in 1938 and 1939 "resulted in completed lifetime or *inter vivos* transfers in those years," and "no testamentary

transfer is involved in this case.” When a similar argument was made to this Court in a similar case, *Commissioner v. Clise*, 122 F. 2d 998, certiorari denied, 315 U.S. 821, cited in our principal brief, this Court decided that the death of the first annuitant was the generating event, and caused a shifting, or the completion of a shifting of an economic benefit of property, which would justify the imposition of the estate tax. In that case this Court said (pp. 1003, 1004):

It is argued, however, that upon her death nothing passed from the dead to the living, that the making of the annuity contracts constituted completed gifts to the second annuitants as of the dates thereof. But this assertion is to no purpose, for, so long as Mrs. Clise lived, it was impossible for the second annuitants to possess or enjoy the economic benefits of the transfer and until Mrs. Clise’s death it was not an absolute certainty that any one of the second annuitants would survive her. The death of the first annuitant, then, was the generating event. *Tyler v. United States*, *supra*. The death of Mrs. Clise caused a shifting, or the completion of a shifting of an economic benefit of property, which is the subject of a death tax. *Chase Nat. Bank v. United States*, 278 U.S. 327, 338, * * * . We quote from *Klein v. United States*, 283 U.S. 231, 234 * * *: “It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.”

* * * * *

The practical effect of the annuity contracts was to reserve to Mrs. Clise the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death. In the light of the *Hallock* case the transfers were "too much akin to testamentary dispositions not to be subjected to the same excise." * * *

The decision of this Court in *Commissioner v. Clise*, *supra*, conclusively establishes that the purchase of the survivorship annuities by the decedent in this case was testamentary in character. In this connection the Closing Brief for Spencer Grant makes this important concession (p. 2):

Of course, if we were dealing with a transfer testamentary in character, there might be merit in defendant's contention that single life contracts are comparable for valuation purposes.

2. On page 8 of the Closing Brief for Spencer Grant, counsel asserts that the Collector has made no defense to the argument that only survivorship contracts are comparable to the annuity contracts in the present case. In reply, we point out that most of Point II, pages 16 to 28, of the Collector's principal brief, is devoted to showing that only single life contracts are comparable to the contract rights which passed to Mr. Grant by virtue of Mrs. Grant's death. Upon the death of Mrs. Grant, Mr. Grant alone became entitled to receive annuities aggregating \$20,-744.52 annually for the rest of his life; the survivorship element was eliminated at that time. Therefore

survivorship contracts are not comparable to what Mr. Grant received upon his wife's death. In fact, Mr. Grant concedes at page 2 of his Closing Brief that if the original purchase of the annuity contracts by Mrs. Grant was testamentary in character, there might be merit in the Collector's contention that single life contracts are comparable for valuation purposes.

Furthermore, letters from seven of the eight insurance companies which issued the original contracts showed that they would not have issued survivorship contracts to Mrs. Grant on the date of her death due to the critical state of her health. (R. 126, 128, 130, 132, 134, 136, 141.) The letter from the remaining company stated that Mrs. Grant would have to pass a satisfactory medical examination in order to have such a contract issued. (R. 138.) The clear inference from these letters is that the only type of annuity contracts the insurance companies would have issued with respect to Mr. and Mrs. Grant on March 2, 1947, the date of decedent's death, were single life contracts based upon the life of Mr. Grant. From this undisputed fact it would seem to follow that only single life annuities are comparable contracts within the meaning of Treasury Regulations 105, Section 81.10 (i)(2). *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (C.A. 3d), cited at pages 18-19 of the Collector's principal brief, appears to be directly in point on that proposition.

In addition, as shown by the actuarial certificate accompanying the estate tax return in the present

case, the estate computed the value of the annuity contracts on the basis of single life annuities (R. 100-104), and the District Court approved this valuation (R. 47). The estate and the District Court, however, used a Table A formula for computing the single life annuities, which is clearly contrary to the Treasury Regulations and to *Mearkle's Estate v. Commissioner*, *supra*, which prescribe replacement cost as the proper measure of value. Compare *Guggenheim v. Rasquin*, 312 U.S. 254, and *United States v. Ryerson*, 312 U.S. 260, holding that for gift tax purposes the valuation of life insurance policies should be based upon replacement cost. Since the federal gift and estate taxes are construed *in pari materia* (*Harris v. Commissioner*, 340 U.S. 106, 107), it would seem to follow that for estate tax purposes replacement cost is the proper measure for valuing annuities. The Third Circuit so held in *Mearkle's Estate v. Commissioner*, *supra*.

On page 8 of the Closing Brief for Spencer Grant, counsel states "we find it significant that the Commissioner did not appeal in either *Higgs* or *Twogood*."* The fact of the matter is that the taxpayer appealed from the decision of the Tax Court in *Higgs*, and the Commissioner appealed in *Twogood*, but the appeals did not involve the question of the proper valuation of the annuity in the estate of the first annuitant. Since the Third Circuit in the *Higgs* case and the

**Estate of Higgs v. Commissioner*, 12 T.C. 280, reversed, 184 F. 2d 427 (C.A. 3d), and *Estate of Twogood v. Commissioner*, 15 T.C. 989, affirmed, 194 F. 2d 627 (C.A. 2d).

Second Circuit in the *Twogood* case decided that the annuity contracts were not testamentary transfers because the second annuitant's rights had their source in the exercise of an option by the decedent and not in a transfer by the decedent, it was not necessary for either court to pass upon the valuation question. The *Higgs* and *Twogood* cases differ from the present case, as pointed out in the Collector's principal brief, because in the first of those cases the employer of the decedent paid the entire cost of the annuity, and in the second the employer paid most of the cost. The Tax Court did not explain in either case how it valued the annuity contracts or the reasons therefor; since the question of valuation was subordinate to the question of whether there was a transfer, the Commissioner apparently did not consider it necessary to appeal the valuation question. On the other hand, there is no indication that the Commissioner took the view that the valuation question was correctly decided in those cases. His position in the present case clearly shows that in this situation he considered the contracts comparable to single life contracts rather than survivorship contracts.

3. On page 19 of the Closing Brief for Spencer Grant counsel states that the Commissioner regularly uses the Table A formula (Section 81.10(i) of Treasury Regulations 105) to value every annuity contract (including annuity contracts issued by charitable organizations), except one issued by an insurance company. The fact is that the Commissioner insists upon the use of replacement cost in valuing charitable gifts

subject to an annuity. See *Gillespie v. Commissioner*, 128 F. 2d 140, decided by this Court; *Raymond v. Commissioner*, 114 F. 2d 140 (C.A. 7th), certiorari denied, 311 U.S. 710. However, in the case of a gift to a private individual subject to an annuity, the Commissioner would use the Table A formula, or (if the transfer was made after 1951) the Table I formula. See T.D. 5906 (estate tax), 1952-1 Cum. Bull. 155, and T.D. 5902 (gift tax), 1952-1 Cum. Bull. 167. In the present case all of the annuity contracts having been issued by insurance companies (R. 38, 55-57, 64-99), there was no occasion to use the Table A formula.

4. On page 22 of the Closing Brief for Spencer Grant there appears the statement that "There is not one iota of support in the record for any notion that the \$160,399 valuation is 'based on single life annuities.' " As shown at pages 20-22 of our main brief, the actuarial certificate clearly shows that the computation of \$160,399.45 is based on a single life, namely, that of Spencer Grant. While the certificate of the actuaries shows that five of the six factors used differ from the factor appearing in Table A for age 67, the differences are due to the different dates for the first payment, as explained at page 22 of the principal brief for the Collector. There is no room for doubt that the \$160,399.45 valuation is based on single life annuities.

CONCLUSION.

The District Court correctly decided that the annuity contracts should be included in the decedent's gross estate; but it erred in deciding that the value of the annuities should be based upon a computation for single life annuities under Table A of the Treasury Regulations. Since single life annuities are comparable contracts to the property that passed to Mr. Grant at the death of Mrs. Grant, the value should be based upon the replacement cost of single life annuities, which has been stipulated to be \$257,117.20.

Respectfully submitted,

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July, 1955.

No. 14,550

United States Court of Appeals
For the Ninth Circuit

WONG KAM WO and WONG KAM YIN,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State
of the United States of America,
Appellee.

BRIEF FOR APPELLANTS.

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Appellee.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

Appellants, Wong Kam Wo and Wong Kam Yin, filed in the United States District Court for the District of Hawaii, on March 11, 1952, a complaint seeking a declaratory judgment of United States citizenship pursuant to the provisions of Section 503 of the Nationality Act of 1940. (54 Stat. 1171; 8 USC 903.)

The District Court denied plaintiffs' petition for a declaratory judgment of citizenship (Supp. T. 4), and plaintiffs appealed. (Supp. T. 6.) Jurisdiction of this Court to review the District Court's decision is conferred by 28 USC 1291 and 1292.

STATUTES INVOLVED.

Section 503 of the Nationality Act of 1940 (8 U.S. C.A. 903) provides, in so far as pertinent here:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or Agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *”

Section 1993 of the Revised Statutes of the United States (Acts of April 14, 1802 and February 10, 1855 (before amended by Act of May 24, 1934, Section 1), 8 U.S.C.A. 6) reads:

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

Section 4 of the Hawaii Organic Act (31 Stat. 141; 48 U.S.C. 494), insofar as pertinent here, reads as follows:

“All persons who were citizens of the Republic of Hawaii on August 12, 1898, are declared to be

citizens of the United States and citizens of the Territory of Hawaii.”

Section 100 of the same Organic Act provided:

“That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii * * *.” (31 Stat. 141; formerly 8 USC 385.)

STATEMENT OF THE CASE.

Appellants, natives of China, claim to have acquired United States citizenship at the time of their births on November 16, 1920 and December 3, 1922 under the provisions of Section 1993, Revised Statutes of the United States, as the lawful blood children of a United States citizen father who resided in the United States prior to their birth. The District Court found that the appellants were born on the dates given and that the appellants, and each of them, are the true and lawful blood sons of Wong Tin, whose United States citizenship is conceded. The Court found that Wong Tin, also known as Wong Kwai Hoy, was born in Honolulu, Republic of Hawaii, on November 25, 1893; that the said Wong Tin departed from Honolulu, Republic of Hawaii on October 9, 1897 and did not return to Honolulu, Territory of Hawaii until 1923, a date subsequent to the birth of both appellants.

From the foregoing facts, the District Court concluded that the appellants did not acquire United States citizenship or nationality at birth, since their father had not resided in the United States prior to their birth. Following such a conclusion, a judgment declaring the appellants not to be United States nationals for the foregoing reason was filed and entered on August 15, 1955. It is from the foregoing conclusion of law and judgment that this appeal follows.

SPECIFICATION OF ERROR.

That the District Court erred in concluding that the plaintiffs, Wong Kam Wo and Wong Kam Yin, did not acquire United States citizenship or nationality at birth under the provisions of Section 1993, Revised Statutes of the United States.

ARGUMENT.

The Hawaiian Islands were acquired by the United States pursuant to the terms of a treaty with the Republic of Hawaii, and by virtue of a joint resolution of Congress, approved July 7, 1898 (30 Stat. 750) accepting incorporation of the Hawaiian Islands as part of this nation. The sovereignty of the Hawaiian Islands was formally transferred to the United States on August 12, 1898. On April 30, 1900, Congress enacted a law (31 Stat. 141) which is normally referred to as the Hawaii Organic Act. Section 4 of

that Act provided that all persons who were citizens of the Republic of Hawaii on August 12, 1898 are declared to be citizens of the United States. Section 5 of the same Act provided that the Constitution of the United States shall have the same force and effect within the Territory of Hawaii as elsewhere in the United States.

Prior to annexation, Section 1 of Article 17 of the Hawaiian Constitution provided that:—

“All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof.”

The Court properly found that Wong Tin, father of the appellants, acquired United States citizenship on April 30, 1900. (23 Op. Atty. Gen. 345; 23 Op. Atty. Gen. 352; *U. S. v. Dang New Wan Lun*, 9 Cir., 88 F2d 88, 89.)

Since the District Court found that Wong Tin is a United States citizen, and that the appellants are his lawful blood children, the question of the citizenship status of the appellants depends upon the determination as to whether Wong Tin “resided in the United States” prior to the birth of each appellant. *Weedin v. Chin Bow*, 274 U.S. 657.

Under Section 100 of the Enabling Act, Congress saw fit to specifically provide—

“That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States * * *.”

In *United States v. Wong Kim Ark*, 169 U.S. 649, 654, 672, 702-703 the Court stated:

“By the Constitution of the United States, Congress was empowered ‘to establish an uniform rule of naturalization.’ In the exercise of this power, Congress, by successive acts, beginning with the act entitled ‘An Act to Establish an Uniform Rule of Naturalization,’ passed at the second session of the first Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time ‘within the limits and under the jurisdiction of the United States,’ and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, ‘dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization.’ Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790 (1 Stat. at L. 103, chap. 3); January 27, 1795 (1 Stat. at L. 414, chap. 20); June 18, 1798 (1 Stat. at L. 566, chap. 5); April 14, 1802 (2 Stat. at L. 153, chap. 28); March 26, 1804 (2 Stat. at L. 292, chap. 47); February 10, 1855 (10 Stat. at L. 604, chap. 71); Rev. Stat. Sections 2165, 2172, 1993.”

* * * * *

“The constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States.' Amend. art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.

* * * * *

“The fourteenth amendment of the constitution, in the declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,’ contemplates two sources of citizenship, and two only—birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, *or by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization act.*” (Italics inserted.)

Also compare:

Zimmer v. Acheson, 10 Cir., 191 F2d 209, 211.

The civil rights and political status of native inhabitants of Hawaii are to be determined by the Acts of Congress. In the instant matter, Wong Tin acquired United States citizenship through collective naturalization at the time of annexation of the Territory of Hawaii. In addition, at the time Congress saw fit to specify the civil rights and political status of those then residing in Hawaii, it deemed it appropriate to specifically provide that "residence in the Hawaiian Islands prior to the taking effect" of such annexation "shall be deemed equivalent to residence in the United States." For these reasons, it is believed that the decision of the Court below is erroneous; that Wong Tin, father of these appellants, had residence in the United States within the meaning of Section 1994, Revised Statutes of the United States, prior to the birth of the appellants herein. It is believed that the statute is clear and that the rights claimed by these appellants were unjustly denied upon an improper construction of the law.

In addition to the reasons cited above, we would like to invite the Court's attention to executive construction in the interpretation of the language of the statute, even though it is realized that such executive decisions are not binding upon the Court.

The Supreme Court of the United States stated in the case of *U. S. v. Cerecedo Hermanos y Compania*, 52 L. Ed. 821, 822:

"We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution."

Also:

Bowles v. Seminole Rock & Sand Co., 89 L. Ed. 1700, 1702;

Brewster v. Gage, 74 L. Ed. 457, 462.

It was stated by the Court of Appeals, 2nd Circuit, in the case of *North American Utility Securities Corp. v. Posen*, 176 F2d 194, at page 197:

“An administrative interpretation which runs counter to a legislative enactment, is, of course, of no significance; but where the meaning of a statutory provision is not clear, the interpretation put upon it by those charged with the duty of administering the Act is entitled to great weight.”

The Court of Appeals for the 7th Circuit expressed the same view in the case of *Bowles v. Mannie & Co.*, 155 F. 129, wherein the Court stated:

“Be that as it may be, we must, however, be mindful of the admonition of the courts that the construction given to a statute (regulation) by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons, *U. S. v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 558, and that the administrative interpretation is of controlling weight unless plainly erroneous or inconsistent with the regulations.”

This Honorable Court expressed the same view in the case of *Ada County v. Oregon Short Line R. Co.*, 95 F2d 669, 671, i.e.:

“* * * the rule is that an interpretation of a statute by an agency charged with enforcement thereof is entitled to consideration and weight.”

Also see:

- Acheson v. Yee King Gee*, 184 F2d 382;
Queensboro Farms Products v. Wickard, 137
 F2d 969;
U. S. v. Moskowitz, 170 F2d 870, 873;
N. L. R. B. v. Medo Photo Supply Corp., 135
 F2d 279, 281, affirmed 88 L. Ed. 1007.

Normally, the Immigration and Naturalization Service is the governmental agency charged with the determination of United States citizenship as well as admissibility. Pursuant to the provisions of 8 C.F.R. 6.1(g), the Board of Immigration Appeals has published certain precedent decisions which are binding on all officers and employees of the Immigration and Naturalization Service, except as they may be modified or overruled by the Board or the Attorney General of the United States.

When considering a case where the facts were identical to the issues presented in the instant case, the Board of Immigration Appeals in the *Matter of L. G. J. and C.I.P.*, 3 I&N Dec. 206, 207, 208, held:

“S—— could not have acquired citizenship by Revised Statutes 1993 unless his father had ‘resided in the United States’ prior to the birth of S——. *Weedin v. Chin Bow*, 274 U.S. 657. The Central Office rules that C—— did not begin to reside in the United States until many years after the birth of S—— and, therefore, concludes that Revised Statutes 1993 did not vest citizenship in S——. With this we disagree. We believe that C——’s residence in Hawaii from 1893 to 1897 satisfied the residence requirements of Revised Statutes 1993, although the United States did not

annex Hawaii until August 1898 and although Hawaii was not incorporated as a territory until April 1900. Section 100 of the Act of April 30, 1900, provided:

That for the purpose of naturalization under the laws of the United States, residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii. * * *

Thus, for purposes of naturalization, residence in the Hawaiian Islands prior to the 1900 statute was made equivalent to residence in the United States. Revised Statutes 1993 was also a naturalization statute. It was enacted pursuant to the power conferred on Congress by the Constitution, article I, section 8, 'to establish an uniform rule of naturalization.' See *Minor v. Happersett*, 88 U.S. 162, 168 (1874); *United States v. Wong Kim Ark*, 169 U.S. 647, 672, 702 (1898). Section 100 of the 1900 act made residence in Hawaii prior to 1900 equivalent to residence in the United States for purposes of judicial naturalization. We think that such residence should be regarded as residence in the United States within the meaning of Revised Statutes 1993, which, as we have seen, is a naturalization statute.

We find, therefore, that S—— acquired citizenship at birth under Revised Statutes 1993. * * *''

A similar decision was made by the Regional Commissioner of the Immigration and Naturalization Service at San Pedro, California, in the case of *Lum Po Chu, et al.*, A8915206, 207, 208 & 209, decided in January, 1956.

It is submitted that the well-established administrative rule, which has been consistently followed over a period of years by the executive department charged with the enforcement of laws relating to aliens and citizens, is entitled to substantial weight in determining the claim of United States citizenship of the appellants herein.

CONCLUSION.

The judgment of the District Court, holding that the appellants are not United States nationals for the reason that their father, Wong Tin, did not reside in the United States prior to their birth, is contrary to the expressed provisions of statutory legislation. It must be concluded that the father had residence in the United States prior to the birth of the appellants within the contemplation of Section 1993 of the Revised Statutes.

Wherefore, appellants pray that the judgment of the District Court be reversed and that a judgment of United States citizenship be entered.

Dated, San Francisco, California,

March 2, 1956.

Respectfully submitted,

W. Y. CHAR,

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By JOSEPH S. HERTOGS,

Attorneys for Appellants.

No. 14,550

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG KAM WO and WONG KAM YIN,
Appellants,
VS.

JOHN FOSTER DULLES, Secretary of State
of the United States of America,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

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No. 14,550

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG KAM WO and WONG KAM YIN,
Appellants,
VS.

JOHN FOSTER DULLES, Secretary of State
of the United States of America,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee agrees with the jurisdictional statement of the appellants (Appellants' Brief p. 1) with the observation that the complaint is found in the record at page 1.

STATUTES INVOLVED.

The appellee adds the following:

Section 100, Hawaiian Organic Act.

“That for the purposes of naturalization under the laws of the United States residence in the

Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.”

31 Stat. 161, 8 U.S.C. 385.

Section 2, Act of March 2, 1907; 34 Stat. 1228; 8 U.S.C. Former Section 17.

“When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.”

Section 6, Act of March 2, 1907; 34 Stat. 1228; 8 U.S.C. Former Section 17.

“That all children born outside the limits of the United States who are citizens thereof in accord-

ance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority.”

Section 101(c), Nationality Act of 1940, Act of October 14, 1940; 54 Stat. 1137; 8 U.S.C. §501.

“The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth.”

Section 101(a)(23), Immigration and Nationality Act, Act of June 27, 1952; 66 Stat. 163 et seq.; 8 U.S.C. §1101(a)(23).

“The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth by any means whatsoever.”

STATEMENT OF THE CASE.

Appellee agrees with appellants’ statement of the case.

SUMMARY OF ARGUMENT.

The appellee contends that Section 100 (31 Stat. 161; 8 U.S.C. 385) of the Hawaiian Organic Act con-

templates and relates only to judicial naturalization. This contention is supported by the plain meaning of the statute, by guides to statutory construction, by the legislative history, and by subsequent Congressional interpretation.

ARGUMENT.

The appellee agrees with the appellants in their statement of the issue involved in this case (Appellants' Brief, pp. 4-5, first 4 paragraphs of argument). The issue involved is truly whether Wong Tin, the father of the appellants, resided in the United States prior to the birth of appellants.

The facts of this case are that Wong Tin resided in the Republic of Hawaii from birth, November 25, 1893 through September, 1897 (R. p. 2; R. pp. 49-50; R. pp. 301-302; Supp. R. pp. 1-2). From this date until 1923, he resided in China (R. p. 2; R. pp. 49-50; R. pp. 301-304; Supp. R. p. 7). Both appellants were born during this period between October 9, 1897 and 1923 (App. Brief p. 3).

Section 1993 R. S., although it has at this late date been repealed (54 Stat. 1173), governs the appellants' status. As interpreted by *Weeden v. Chin Bow*, 274 U.S. 657, the father must have resided in the United States prior to the birth of the child in order to confer citizenship.

Examining the father's places of residence prior to the birth of appellants there appear to be only two

possible places of residence: China and the Republic of Hawaii.

Discounting China as a part of the United States, we move on to the other place—the Republic of Hawaii, also a foreign country at the time of the father's birth and residence therein. Going no further and examining Section 1993 R. S. as interpreted by *Weeden v. Chin Bow, supra*, the proposition that this amounts to residence in the United States becomes preposterous.

Therefore, to bring this fact situation within Section 1993 R. S. some other statute must apply. As ably set forth in appellants' brief their contention is that Section 100 of the Hawaiian Organic Act applies. We think not. Section 100 is also another repealed statute (54 Stat. 1172).

Therefore, neither section under consideration herein is a living or growing statute. As a matter of fact when the Matter of L.G.J. and C. I. P., 3 I&N, Dec. 206, was decided (April 2, 1948), these sections had been repealed for almost eight years and the Board of Immigration Appeals was merely interpreting the dead hand of the law. This matter will be specifically treated elsewhere in this brief. The theory of the appellants' case is patterned after the theory of the administrative decision referred to. It is quite simple.

Appellants state that Section 1993 is a naturalization statute, citing *U. S. v. Wong Kim Ark*, 169 U.S. 649, 672, 702 (1898). Secondly, they state that Section 100 of the Hawaiian Organic Act provides: for the

purpose of naturalization under the laws of the United States that residence in the Hawaiian Islands shall be considered residence in the United States. This is the key and the crux to the case and it is here that appellee believes that appellants' contention is erroneous.

U. S. v. Wong Kim Ark, supra, was decided after a comprehensive review of the common law background of the Constitution and the 14th Amendment thereof. It held that the racial extraction of a person (i.e. Chinese) has no bearing on whether he or she acquires U. S. citizenship at birth under the Constitution of the United States. All that is necessary is that a person be born within the United States and be subject to the jurisdiction thereof. By way of dicta naturalization statutes were discussed and it was concluded that Section 1993 R. S. was enacted under Congress' power to prescribe a uniform rule of naturalization, p. 703. The Court finally concluded at p. 704:

“The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, ‘All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’ ”

However, this Court held that Section 1993 R. S. applied to all persons regardless of race (*Quon Hing Sun v. White* (9th Cir. 1918), 254 F. 402, 404).

More pertinent at this time is the meaning of the word "naturalization". First of all what is the ordinary meaning of "naturalization"?

(1) A dictionary definition.

"That act or process of naturalizing, or state of being naturalized."

Naturalize.

"To confer the rights or privileges of a native subject or citizen on; to make as if native, to adopt (as an alien) into a state and place in the condition of a native subject or citizen."

Webster's New International Dictionary of the English Language, 1942 Ed.

(2) A legal dictionary definition.

"The act by which an alien is made a citizen of the United States of America. The act of adopting a foreigner and cloaking him with all the privileges of a native born citizen."

Bouvier's Law Dictionary.

(3) Act of October 14, 1940, §101(c), (54 Stat. 1132 et seq.).

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth."

(4) 8 U.S.C. §1101(a)(23).

"The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever."

Assuming as we must that Section 1993 R. S. is a statute enacted under Congress' power to prescribe a

uniform rule of naturalization, an examination of the words of Section 100 itself become appropriate. At the outset, the only word which needs interpretation is "naturalization". The word is used twice in the section and it should be given its usual, natural, plain, ordinary, and commonly understood meaning. (*Crane v. C.I.R.*, 331 U.S. 1; *Addison v. Holly Hill Fruit Products*, 332 U.S. 607; *Helvering v. Hutchings*, 312 U.S. 393.) The plain meaning of the words of a statute have great weight. (*Browder v. U. S.*, 312 U.S. 335.) The natural and commonly understood meaning should be given to words used in a statute unless it is clear from the statute, the words within a statute, or from the circumstances that a different meaning was intended. *Bracy v. Laray*, 138 F. (2d) 8; *Gorin v. U. S.*, 111 F. (2d) 712. What then is the ordinary meaning of naturalization? It is that procedure whereby an alien becomes a citizen. It is a process which requires an original foreign nationality and a subsequent change. Do the context or the words of this statute lead to a different result? We think not. The second half of the section—omitted by the appellants in their brief—demonstrates clearly the meaning ascribed to the word.

"* * * and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but *all other provisions of the laws of the United States relating to naturalization* shall as far as applicable apply to persons in the said Islands." (Italics supplied.)

What could be more clear from the words of the statute than that Congress contemplated judicial naturalization only? The two exceptions contained in the statute apply to judicial naturalization and give meaning to the whole section.

The appellee contends further that the following guides to statutory construction are applicable.

Noscitur a sociis applies in that the phrases "naturalization under the laws of the United States" and "provisions of the laws of the United States relating to naturalization" are colored and given meaning by the specific references to "declaration of intention" and "renunciation of former allegiance". These refer to judicial naturalization. *International Rice Milling Co. v. N.L.R.B.* (5th Cir.), 153 F. (2d) 21, reversed on other grounds, 341 U.S. 665; *Ex Parte Marquez*, 3 Cal. (2d) 625, 45 P. (2d) 342.

Ejusdem generis applies also where the generalized term follows specific classes. The generalized term is given the meaning of the specific classes and is restricted to similar subject matter. Here the general term provisions of law relating to naturalization is colored by the specific references to Declarations of Intention and renunciation of former allegiance. (*Cain v. Bololby*, 114 F. (2d) 519; *In re Bush Terminal Co.*, 93 F. (2d) 659.)

However, no matter how compelling or clear words of a statute may be (the appellee contends this statute is clear), there certainly is no rule of law forbidding the examination of the legislative history of the statute. *Harrison v. Northern Trust Co.*, 317 U.S.

476. Indeed the rule now is that examination of the legislative history is mandatory. *Employees v. Westinghouse Corp.*, 348 U.S. 437, 444 (1954).

It is the contention of the appellee that the statute is so plain that the meaning of the words in dispute when read in context is inescapable. Congress contemplated judicial naturalization and nothing more. Any further stretching of the statute is unwarranted.

The legislative history also leaves no doubt but that Congress intended Section 100 to apply to judicial naturalization.

The first observation to be made is that the section under consideration remained unchanged from beginning to end of the legislative process. (Sec. 104, Proposed bill in Hawaiian Commission Report—Sen. Doc. 16, 55th Cong. 3rd Session, Dec. 6, 1898; Sec. 102 in S. 222, 56th Congress; Sec. 101 in H. R. 2972, 56th Congress; Sec. 100 S. 222 as passed by House; Sec. 100 S. 222 as reported by Conf. Comm.; and finally Sec. 100 of the Act as approved.) The debates on the floor of both houses reflect that this section was not discussed.

Two Committee reports are available; both are House Reports (House Report 549, 56th Congress, March 7, 1900, on S. 222; and House Report 305, 56th Congress, February 12, 1900, to accompany H. R. 2972.) These reports do not specifically analyze this section. As a matter of fact, House Report 549 provides only that all, after the enacting clause of S. 222, be stricken and the House Bill, H. R. 2972, be substituted.

House Report 305 is a comprehensive report on the House version of the bill. It does not specifically discuss Sec. 100 (Sec. 101 of H. R. 2972).

But, at pp. 8-9, a discussion on the meaning of citizenship reflects very clearly what Congress had in mind in using the word "naturalized". It is apparent that the Congressmen were thinking in terms of acquisition of citizenship after birth. We quote:

"Citizenship

The persons who were citizens of the Republic of Hawaii on August 12, 1898, are defined in Article 17 of the Constitution of Hawaii.

Art. 17. All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof.

This includes all who were subjects under the monarchy and all who became citizens of the Republic.

About 700 Chinese have been *naturalized* and several hundred foreigners of other nations.

The 700 *naturalized* Chinese include all who have been *naturalized* during the past 50 years. Many of them have since returned to China and many have died; the number remaining is a matter of conjecture, but would compromise only a portion of the whole number.

No foreigners have been *naturalized* since July, 1894, as under the Constitution of the Republic adopted July 4, 1894, only those could become *naturalized* who were 'citizens or subjects of a country having express treaty stipulations with

the Republic of Hawaii concerning *naturalization*'. (Constitution, Article 18). And none of the Hawaiian treaties contained such a provision. Accordingly, the citizenship of the new Territory will be made up of native Hawaiians, and Americans, and Europeans in Hawaii, together with about 700 *naturalized* Chinese . . ." (Emphasis added.)

The quoted discussion, the wording "that for the purposes of naturalization" and the specific wording referring to renunciation of former allegiance and Declaration of Intention (Sec. 100), all clearly indicate that Congress was contemplating judicial naturalization and nothing more.

Probably the Act of March 2, 1907 (34 Stat. 1228) most clearly demonstrates the difference Congress had in mind between "naturalization" and "acquisition of citizenship" under Sec. 1993.

Sec. 2. " . . . When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

Sec. 6. "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

There is a world of difference between a citizen who has lost his citizenship and one who would not be entitled to receive the protection of this government. In Sec. 2 and Sec. 6 above, we have as clearly as it can be stated, Congressional differentiation between a "naturalized" citizen and a Sec. 1993 citizen.

The later Congressional pronouncements, Sec. 101(c), Act of October 14, 1940 (54 Stat. 1137) and present Sec. 1101(a)(23), Title 8 U.S.C. leave no doubt that Congress has intended all along that naturalization means acquisition of citizenship after birth. This, although not binding upon the Court, serves as a guide to the meaning of the word "naturalization".

The privilege of citizenship has been held to be within the exclusive power of Congress to confer or withhold. The Court must strictly construe acts granting such privileges. *U. S. v. Dang Mew Wan*, (9th Cir. 1937), 88 F. (2d) 88.

ADMINISTRATIVE INTERPRETATION.

The statutes here under consideration have been interpreted administratively to mean that residence in the Republic of Hawaii is residence in the United States for the purposes of Sec. 1993 R. S. The appellee contends that this interpretation is clearly erroneous. It runs counter to the plain unequivocal words of the statute, counter to the legislative history of the statute, and counter to subsequent Congressional interpretation.

As has been noted by appellants once an administrative precedent decision is published, it is binding on all officers and employees of the Immigration Service. (App. Brief p. 10.) To decide a case counter to such administrative decision, would be a violation of regulations. Unless unusual circumstances were present, there is little or no opportunity for judicial review. Certainly the alleged citizen would not appeal a favorable decision nor would the matter ever reach the Board of Immigration Appeals again without a blatant violation of regulations.

The facts of the administrative case cited above are important. They show a parallel to this case, and also point up the hardship present in that case, which could have led to the erroneous decision of that case. We quote from the decision, pp. 206, 207:

“ . . . S—’s citizenship depends, in turn, on the citizenship status of his father, C—K—C—. C— was born in Hawaii in October 1893 and his parents took him to China in 1897. He married there and S—was born in China in October 1912. In

March 1913 C— was admitted to Hawaii as a citizen of the United States. Later in the same year he was admitted at San Francisco as a citizen, and he has resided here ever since. C— acquired United States citizenship by virtue of section 4 of the act of April 30, 1900, which conferred United States citizenship on citizens of the Republic of Hawaii.

“S— arrived at San Francisco in 1925 and he sought admission as a citizen of the United States. A Board of Special Inquiry excluded him on the ground that the evidence did not establish his relationship to C—. On review, however, the Department ordered that he be admitted as a citizen. The immigration authorities also recognized S—’s claim to United States citizenship in February 1931, when they issued him a citizen’s return certificate on his departure to China. He returned from China in March 1933. Thus on three occasions the immigration authorities have found that S— was a citizen of this country. S— served honorably in the United States Army between November 1942 and December 1945. Had a question arisen concerning his citizenship status during this period, he could have been naturalized pursuant to section 701 of the Nationality Act of 1940, as amended, which has now expired.”

It can readily be seen then that S—, the person whose status is parallel to the appellants here, had on three occasions been conceded citizenship by the Immigration and Naturalization Service. In addition, he had served honorably in the United States Army during World War II. Although these equities as a matter of law should not have influenced the Board of Im-

migration Appeals, they apparently did to the extent of causing them to twist the plain meaning of the language contained in both statutes.

One last observation ought to be made concerning the administrative decision. When the case was decided both statutes had been repealed for a period of almost eight years. These statutes were not reenacted. New sections were substituted which had much more stringent requirements than that contained in the repealed sections. It has been held by this Court that it is within the exclusive power of Congress to confer the privilege of citizenship, and the Court must strictly construe acts granting such privileges. *U. S. v. Dang Mew Wan* (9th Cir. 1937), 88 F. (2d) 88.

In the following cases the statutes construed were living-growing statutes: *North American Utility Securities Corp. v. Posen* (2 Cir. 1949), 176 F. (2d) 194; *Ada County v. Oregon Short Line R. Co.*, (9th Cir. 1938), 97 F.(2d) 666, 671; *Bowles v. Mannie & Co.*, (7th Cir. 1946), 155 F.(2d) 129, 133; *Acheson v. Yee King Gee*, (9th Cir. 1950), 184 F.(2d) 383, 384; *U. S. v. Moskowitz*, (5th Cir. 1948), 170 F.(2d) 870; *N.L.R.B. v. Medo Photo Supply Corp.*, (2nd Cir. 1943), 135 F.(2d) 279; *Queensboro Farms Products v. Wickard*, (2nd Cir. 1943), 137 F.(2d) 969.

The above cases have been analyzed on the basis of whether the statute is living because of the basis for the rule enunciated therein. Where a statute is "living", in existence and presently applicable, then if the legislature does not approve of the executive's

interpretation, the statute may be changed and clarified by the legislature. A failure to amend by the legislature shows an acquiescence in the administrative interpretation.

That situation does not exist here. These are repealed statutes we are dealing with. They were repealed when the Board of Immigration Appeals passed on them. Furthermore, Congress disapproved of the loose construction of Section 1993 R. S., as shown by their enactment of progressively more stringent requirements. (Act of May 24, 1934, Sec. 1, 48 Stat. 797, 8 U.S.C. 6; Act of October 14, 1940, Sec. 201, 54 Stat. 1138-1139, 8 U.S.C. 601; Act of June 27, 1952, Sec. 301, 66 Stat. 235, 8 U.S.C. 1401.) Consequently, not only does the reason for the rule no longer exist but in addition Congress had demonstrated its displeasure with this section by amending it frequently.

CONCLUSION.

It is submitted that the decision of the District Court is sound. Residence in the Republic of Hawaii does not amount to residence in the United States for the purposes of Section 1993 R. S. Section 100 of the Hawaiian Organic Act applies to and contemplates judicial naturalization only. Consequently, the father does not have residence in the United States with which to confer citizenship upon appellants.

Wherefore, the appellee prays that judgment of the District Court be affirmed.

Dated, Honolulu, T. H.,
April 9, 1956.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

No. 14,550

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG KAM WO and WONG KAM YIN,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State
of the United States of America,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

APPELLEE'S PETITION FOR A REHEARING.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

*Attorneys for Appellee
and Petitioner.*

FILED

SEP 18 1956

PAUL P. O'BRIEN, CLERK

No. 14,550

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG KAM WO and WONG KAM YIN,
Appellants,

VS.

JOHN FOSTER DULLES, Secretary of State
of the United States of America,
Appellee.

**On Appeal from the District Court of the United States
for the District of Hawaii.**

APPELLEE'S PETITION FOR A REHEARING.

*To the Court as Constituted in the Original Hearing
of the Above Entitled Appeal, Namely: Honorable
William Healy, Circuit Judge; Honorable
William E. Orr, Circuit Judge; and Honorable
Frederic G. Hamley, Circuit Judge:*

Comes now John Foster Dulles, appellee above-named, and presents this, his petition for a rehearing of the above entitled matter for the following reasons:

The opinion of the Court has ruled that §2, Act of March 2, 1907 (34 Stat. 1228) applies to the appel-

lants in this case. (Pages 4 and 5.) *Zimmer v. Acheson*, 191 F. (2d) 209.

The District Court held that such was not the case and consequently cut off any inquiry as to whether appellants had expatriated themselves. It is suggested that the District Court be allowed to take evidence if necessary *concerning* the *presumption of expatriation* and to make findings concerning appellants' possible expatriation. It is to be noted that as in *Zimmer v. Acheson, supra*, neither appellant did much of anything to overcome this presumption of expatriation.

It is submitted that the rehearing be granted and that the action be remanded to the District Court for further proceedings to ascertain whether expatriation has occurred in either or both of appellants' cases, this, all in conformity with the opinion heretofore filed.

Dated, Honolulu, T. H.,
September 12, 1956.

Respectfully submitted,

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL.

I, Charles B. Dwight III, one of the attorneys for appellee and petitioner above named, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated, Honolulu, T. H.,
September 12, 1956.

CHARLES B. DWIGHT III,
Assistant United States Attorney,
*Attorney for Appellee
and Petitioner.*

No. 14551

**United States
Court of Appeals
For the Ninth Circuit.**

JAMES J. BENNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Fourth Judicial Division**

FILED

JUL 12 1957

No. 14551

**United States
Court of Appeals
For the Ninth Circuit.**

JAMES J. BENNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Fourth Judicial Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendant and Appellant.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1817 Cr.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

FERN BENNETT, Also Known as BETTY Mc-
ALLISTER; NORMA RUTH CROSBY,
WESLEY KEHERT and JAMES J. BEN-
NETT, Also Known as JACK BENNETT,
Defendants.

INDICTMENT

Count I.

The Grand Jury charges in Count I of this In-
dictment:

That Fern Bennett, also known as Betty Mc-
Allister; Norma Ruth Crosby, Wesley Kehert and
James J. Bennett, also known as Jack Bennett, on
or about the 28th day of June, 1953, in the Fourth
Judicial Division, Territory of Alaska, then and
there being, did then and there feloniously trans-
port in interstate commerce, to wit, from the State
of Texas to the Territory of Alaska, a woman, to
wit, Marilyn Jean Casey, for the purpose of prosti-
tution, in violation of Title 18, Section 2421, of the
United States Code Annotated.

Count II.

The Grand Jury charges in Count II of this In-
dictment:

That Fern Bennett, also known as Betty McAllister; Norma Ruth Crosby, Wesley Kehert and James J. Bennett, also known as Jack Bennett, on or about the 28th day of June, 1953, in the Fourth Judicial Division, Territory of Alaska, then and there being, did then and there feloniously conspire to commit an offense against the United States, and did an act to effect the object of the conspiracy, to wit, transport in interstate commerce, to wit, from the State of Texas to the Territory of Alaska, in violation of Section 2421 of Title 18 of the United States Code Annotated, a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution, in violation of Section 371 of Title 18 of the United States Code Annotated.

Dated at Fairbanks, Alaska, this 13th day of November, 1953.

A True Bill.

/s/ VIRGIL M. CADY,

Foreman of the Grand Jury.

/s/ THEODORE F. STEVENS,

United States Attorney.

Witnesses before the Grand Jury:

Edward J. Harkabus,

Marilyn Jean Casey.

Crime: Count I: Transportation of a woman for the purpose of prostitution.

Count II: Conspiracy.

Presented to the Court by the Foreman of the Grand Jury, in open Court, in the presence of the Grand Jury, and filed in the District Court, Territory of Alaska, Fourth Division.

[Endorsed]: Filed November 13, 1953.

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence here find:

As to Count I of said Indictment:

(a) That defendant Fern Bennett, also known as Betty McAllister, is Not Guilty of the crime of feloniously transporting, in interstate commerce, a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution as charged in Count I of said indictment in this case and in violation of Section 2421, T. 18, U. S. Code.

(b) That defendant Norma Ruth Crosby, is Not Guilty of the crime of feloniously transporting a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution as charged in Count I of the indictment in this case.

(c) That defendant Wesley Kehert is Guilty of the crime of feloniously transporting a woman, to wit, Marilyn Jean Casey, for the purpose of prosti-

tution as charged in Count I of the indictment in this case.

(d) That defendant James J. Bennett, also known as Jack Bennett, is Guilty of the crime of feloniously transporting a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution as charged in Count I of the indictment in this case.

As to the matters set forth in Count II of said indictment, we, the jury find:

(a) That two or more of said defendants, to wit Fern Bennett, Norma Ruth Crosby, Wesley Kehert and Jack Bennett are Not Guilty of the crime of conspiring to commit an offense against the United States as denounced by Section 371, T. 18, U. S. Code and Count II of said indictment herein.

(b) That one or more of said defendants, to wit, Fern Bennett, Norma Ruth Crosby, Wesley Kehert and Jack Bennett are Not Guilty of doing an act to effect the object of said conspiracy, to wit, actually transporting said Marilyn Jean Casey for the purpose of prostitution in interstate commerce between the State of Texas and the Territory of Alaska as charged in Count II of said indictment.

(c) That such of said defendants as have not been found guilty by virtue of the matters heretofore set forth as to Count I of the indictment herein in sub-paragraphs (a) to (d) of this Verdict are hereby found not guilty of the crime described in Count I of said indictment.

(d) That such of said defendants as have not been found guilty by virtue of the matters set forth as to Count II of the indictment herein in subparagraphs (a), (b) and (c), inclusive, of this verdict are hereby found not guilty of the crimes described in Count II of said indictment.

Done at Fairbanks, Alaska, this 16th day of May, 1954.

/s/ [Indistinguishable]
Foreman.

[Endorsed]: Filed and entered May 16, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come Now James J. Bennett and Wesley Kehrt, two of the above-named defendants, and move this Court to grant them a new trial for the following reasons:

1. That the Court erred in denying defendants' Motion for Acquittal made at the close of plaintiff's case.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is not supported by substantial evidence.
4. That the Court erred in overruling defendants' Motion to suppress evidence unlawfully seized.

5. That the Court erred in admitting testimony of Walter Brown, to which objections were made.

6. That the Court erred in charging the jury and in refusing to charge the jury as requested.

7. That the Court erred in admitting evidence which was incompetent, irrelevant and immaterial, and to which objection was made by defendants.

8. That the verdict was contrary to the law.

9. That the verdict of the jury was coerced in that the jury was required by the Court to deliberate an unreasonable length of time after the Court being informed by the jury that the jury was deadlocked.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

ORDER AND SENTENCE

The Government was represented by Theodore F. Stevens, United States Attorney; defendant Bennett was present and represented by Warren A. Taylor.

Respective counsel presented argument on the defendant's motion for a new trial.

It was Ordered that the motion be denied.

This being the time for the passing of Sentence in this cause, the motion for a new trial having

been denied, Mr. Stevens presented a statement to the Court.

Mr. Taylor presented a statement in behalf of the defendant.

The defendant James J. Bennett waived any statement.

It was the sentence of the Court that defendant James J. Bennett be confined in an Institution of the penitentiary type for the period of five (5) years, said institution to be selected by the Attorney General of the United States; the Supersedeas Bond was set at \$25,000.00 and the defendant was released in the custody of his counsel pending the filing of the Supersedeas Bond as set above.

Entered May 25, 1954.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1817 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY KEHRT, et al.,

Defendants.

JUDGMENT AND COMMITMENT

On this 28th day of May, 1954, came the attorney for the Government and the defendant, Wesley Kehrt, appeared in person and by counsel.

It Is Adjudged that the defendant, Wesley Kehrt, has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Transportation of a Woman for the Purpose of Prostitution, as charged in Count I of the Indictment on file herein, and the Court having asked the said defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant, Wesley Kehrt, is guilty as charged and convicted.

It Is Adjudged that the defendant, Wesley Kehrt, is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for a period of five (5) years, such sentence to commence on the 28th day of May, 1954.

It Is Adjudged that the defendant, Wesley Kehrt, pay to the Clerk of the Court the sum of Five Thousand Dollars (\$5,000.00), assessed against him as a fine herein and that said defendant be imprisoned until the payment of said fine or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy serve as the commitment of the defendant herein, and that said defendant pay the costs of this action in the sum of \$....., to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 28th day of May, 1954.

/s/ HARRY E. PRATT,
District Judge.

The Court recommends commitment to: the Attorney General.

/s/ JOHN B. HALL,
Clerk.

[Endorsed]: Filed and entered May 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is James J. Bennett, Anchorage, Alaska.

The name and address of appellant's attorney is Warren A. Taylor, 524½ Third Avenue, Fairbanks, Alaska.

The appellant was charged with transporting a woman for purposes of prostitution, in violation of Title 18, Section 2421 of the United States Code, Annotated, and the jury returned a verdict of guilty as charged in the indictment, and sentenced the defendant to 5 years in the penitentiary and/or fined \$ none.

The judgment of the above-entitled Court entered on the 25th day of May, 1954, adjudged that

the appellant had been convicted on a verdict of guilty of the crime of transporting in interstate commerce, to wit: From the State of Texas to the Territory of Alaska, a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution.

On the 25th day of May, 1954, the above-entitled Court entered an Order denying appellant's Motion for a New Trial.

James J. Bennett, the above-named appellant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and order.

Dated at Fairbanks, Alaska, this 25th day of May, 1954.

/s/ WARREN A. TAYLOR,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

COUNTER AFFIDAVIT IN REGARD TO
MOTION TO SUPPRESS EVIDENCE

United States of America,
Territory of Alaska—ss.

I, Edward J. Harkabus, being first duly sworn on oath depose and say:

That on the 6th day of July, 1953, I was an

agent for the Federal Bureau of Investigation. That Agent John W. Worsham and myself served a duly-authorized Federal Warrant on Jack Bennett at Room 404 in the Fifth Avenue Hotel Annex after identifying ourselves as Bureau agents. That at the time we entered the aforesaid room, Theodore R. McRoberts, Acting United States Marshal, was there. That as a search incidental to this lawful arrest, Bennett and his effects were searched. We seized certain property under the control of Bennett, including a billfold and other property. Certain gas coupons found in this billfold have been retained as evidence relevant to the charge against him.

Dated at Fairbanks, Alaska, this 7th day of May, 1954.

/s/ EDWARD J. HARKABUS.

Subscribed and sworn to before me this 7th day of May, 1954.

/s/ OLGA T. STEGER,
Chief Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

COUNTER AFFIDAVIT IN REGARD TO
MOTION TO SUPPRESS EVIDENCE

United States of America,
Territory of Alaska—ss.

John W. Worsham, being first duly sworn on oath, deposes and says:

That I am an agent for the Federal Bureau of Investigation.

That upon the 6th day of July, 1953, while in the company of Edward Harkabus, also an agent for the Federal Bureau of Investigation on that date, your affiant conducted a search for one Jack Bennett because Agent Harkabus had in his possession a Federal warrant for the arrest of the said Bennett.

That your affiant received notice that said Bennett might be located at the Fifth Avenue Hotel Annex and proceeded to that place. That Agent Harkabus and myself found Jack Bennett at the Fifth Avenue Hotel Annex and arrested him pursuant to the warrant which was outstanding against him. That at the time Agent Harkabus and myself entered said Bennett's room, Acting United States Marshal Theodore R. McRoberts was present in the room.

That incidental to said arrest, pursuant to the warrant as aforesaid, Agent Harkabus and myself seized certain property of the said Bennett which

was connected with the offense with which he was charged, to wit, certain gas coupons and other property. This property was located in the room in which Mr. Bennett was found, which room was then under his control. At no time did I or anyone else in my presence pull or use a gun in connection with this arrest.

Dated at Fairbanks, Alaska, this 7th day of May, 1954.

/s/ JOHN W. WORSHAM.

Subscribed and sworn to before me this 7th day of May, 1954.

/s/ OLGA T. STEGER,
Chief Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

COUNTER AFFIDAVIT IN REGARD TO
MOTION TO SUPPRESS EVIDENCE

United States of America,
Territory of Alaska—ss.

I, Edward J. Harkabus, being first duly sworn on oath depose and say:

That on the 6th day of July, 1953, I was an agent for the Federal Bureau of Investigation. That Agent John W. Worsham, Acting United States

Marshal Theodore R. McRoberts, and myself served a duly-authorized Federal Warrant of arrest for Wesley Edward Kehrt at the "Transient Rooms" located on South Cushman Street.

That I had received information that Wesley Kehrt was armed and could be located at the aforementioned location.

That I knocked upon the door of Kehrt's room advising him that we were Federal Agents and had a warrant for his arrest. He opened the door and I covered him with my gun. That incidental to said arrest, pursuant to the aforesaid warrant, Agent Worsham and myself seized certain property in the possession of Kehrt.

That both Agent Worsham and myself had been informed that a camera, photographs and other evidence, property of one Marylian Jean Casey, the victim in instant case, were in the possession of said Kehrt, this evidence was seized incidental to the lawful arrest of Kehrt.

Dated at Fairbanks, Alaska, this 7th day of May, 1954.

/s/ EDWARD J. HARKABUS.

Subscribed and sworn to before me this 7th day of May, 1954.

/s/ OLGA T. STEGER,
Chief Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Theodore R. McRoberts, being first duly sworn on oath deposes and says:

That on the 6th day of July, 1953, I had a warrant issued under the Territorial law for the arrest of Norma Ruth Crosby and Carol Ward. That I went to the Fifth Avenue Hotel Annex and arrested said two defendants. That Lieutenant Trafton, of the Department of Territorial Police, accompanied me at the time of said arrest.

That at the time we arrested said two individuals, Jack Bennett was in their company. At that time I did not have a warrant for his arrest and did not know there was a warrant outstanding for his arrest. Said Jack Bennett voluntarily accompanied Lt. Trafton and myself and the girls to the Federal Jail at his own request. He was not placed under arrest.

After the two girls had been booked, Mr. Bennett asked me to return him to the Fifth Avenue Hotel Annex. I notified Agent Harkabus that I was in the company of Mr. Bennett and that I would return him to his room at the said hotel, and at that time Agent Harkabus told me they were going to attempt to obtain a warrant for Bennett's arrest on the charge of Interstate Transportation of a Woman

for Prostitution. I returned to the hotel with Bennett and was talking with him in his room concerning the activities of the two girls when Agent Harkabus and Agent Worsham, of the Federal Bureau of Investigation, came to the room and announced they had a Federal warrant for the arrest of the said Bennett. I personally witnessed the search of Bennett's room. I know that the search conducted was a search incidental to the lawful arrest and was confined to the room then under Mr. Bennett's control.

Dated at Fairbanks, Alaska, this 7th day of May, 1954.

/s/ THEODORE R. McROBERTS.

Subscribed and sworn to before me this 7th day of May, 1954.

[Seal] /s/ WALLIS C. DROZ,
Notary in and for the
Territory of Alaska.

My commission expires 4-16-58.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

COUNTER AFFIDAVIT IN REGARD TO
MOTION TO SUPPRESS EVIDENCE

United States of America,
Territory of Alaska—ss.

John W. Worsham, being first duly sworn on oath, deposes and says:

That I am an agent for the Federal Bureau of Investigation.

That upon the 6th day of July, 1953, while in the company of Edward Harkabus, also an agent for the Federal Bureau of Investigation on that date, your affiant conducted a search for one Wesley Kehrt because Agent Harkabus had in his possession a Federal Warrant for the arrest of the said Kehrt.

That Agent Harkabus and myself found Wesley Kehrt at the Transient Rooms and arrested him pursuant to the warrant which was outstanding against him.

That incidental to said arrest, pursuant to the warrant as aforesaid, Agent Harkabus and myself seized certain property in the possession of the said Kehrt.

That Agent Harkabus and myself were informed and believed at that time that a camera and certain photographs, taken from the possession of the said Kehrt, were the property of one Marylian Jean Casey, the victim herein. That said Marylian Jean Casey had told us these articles and other personal

articles, such as clothing, were her personal property and that at the time of said arrest, said Marylian Jean Casey had informed us she was residing in the Transient Rooms in the same room with the said Wesley Kehrt.

Dated at Fairbanks, Alaska, this 7th day of May, 1954.

/s/ JOHN W. WORSHAM.

Subscribed and sworn to before me this 7th day of May, 1954.

[Seal] /s/ OLGA T. STEGER,
Chief Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED
INSTRUCTIONS

No. One

You are instructed that "If an interstate journey was planned with no immoral purpose at the time, no crime was committed, since immoral relations, standing alone, unconnected with interstate commerce, does not violate Federal statute."

U. S. v. Grace,
73 F. 2d, 294.

No. Two

You are further instructed that, "If the sole purpose of interstate journey with a woman or girl is

legitimate, a purely incidental intent to have intercourse en route is not a Federal offense.”

Long vs. U. S.,
160 F. 2d, 706.

No. Three

You are instructed that, “The mere commission of an immoral act by defendant while on an interstate journey with a woman for a lawful purpose does not, where the immorality was merely casual, constitute a violation of the White Slave Act.”

Biggerstaff vs. U. S.,
260 F. 926.

No. Four

You are instructed that, “Under a statute condemning transportation of a female in interstate commerce for immoral purpose, the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip; but if the sole purpose is legitimate, purely incidental intent to have intercourse is not a Federal offense.”

Yoder vs. U. S.,
80 F. 2d, 665.

No. Five

You are instructed that if you believe from the evidence that Marylin Jean Casey requested the defendants to transport her to the Territory of Alaska and the defendants did so transport her without knowledge that she intended to engage in prostitu-

tion, then the evidence would be insufficient to convict the defendants or either of them.

Thom vs. U. S.,
278 F. 933.

No. Six

You are instructed that in a prosecution for transporting a woman on interstate commerce for immoral purposes, the prosecution must have evidence other than the written statement of witness prior to trial and during trial. The written statement in itself is insufficient to sustain a verdict of guilty.

U. S. vs. Biener,
52 F. Supp. 54.

No. Seven

You are instructed that, "It is the inducement and transportation, not the subsequent conduct, which constitutes an offense under the White Slave Act."

Shama vs. U. S.,
94 F. 2d 1.

No. Eight

You are instructed that, "An immoral purpose first conceived at the end of a journey is not sufficient to sustain a conviction under the White Slave Act."

Shama vs. U. S.,
94 F. 2d 1.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1817 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FERN BENNETT, Also Known as BETTY Mc-
ALLISTER; NORMA RUTH CROSBY,
WESLEY KEHERT, and JAMES J. BEN-
NETT, Also Known as JACK BENNETT,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances:

THEODORE F. STEVENS,

United States Attorney of Fairbanks,
Alaska, and

GEORGE M. YEAGER,

Assistant U. S. Attorney, of Fairbanks,
Alaska,

Attorneys for Plaintiff.

WARREN A. TAYLOR,

Of Fairbanks, Alaska,

Attorney for Defendant.

Dates: May 10, 11, 12, 13, and 14, 1954.

Place: Fairbanks, Alaska.

Before: Hon. Harry E. Pratt, District Judge, and
Jury.

Be It Remembered, that at 10:00 a.m., upon the 10th day of May, 1954, the trial of this cause, No. 1817, Criminal, was begun, plaintiff and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

(At this time, Mr. Stevens made a brief statement to the veniremen and Mr. Taylor and Mr. Stevens proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above-named cause.)

The Court: Upon adjournment the jurors not engaged in the trial of this cause will be excused until Thursday morning at ten o'clock. We will take a ten-minute recess.

(Thereupon, at 2:50 p.m., the court took a recess until 3:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. Call Marilyn Jean Casey.

The Court: You care to make your opening statement?

Mr. Stevens: Oh, I beg your pardon, your Honor. I'm sorry. [1*]

(Mr. Stevens presented his opening statement to the jury.)

(Mr. Taylor presented his opening statement to the jury.)

The Court: Call your first witness.

Mr. Stevens: Now, I call Miss Casey, your Honor.

Mr. Taylor: If the Court please, we would like to invoke the rule that all witnesses that are not testifying remain outdoors.

The Court: All witnesses and persons who expect to be called as witnesses will remain out of the courtroom until they are called to testify.

MARILYN JEAN CASEY

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Mr. Stevens: Miss Casey, if you will hold that up and speak right into it, please.

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Marilyn Jean Casey.

Q. How old are you?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Marilyn Jean Casey.)

A. Twenty-one, born June 17, 1932.

Q. Where do you reside now?

A. My present residence now is 713 Tenth Street, Fairbanks, Alaska. [2]

Q. Where did you live prior to coming to Alaska?

A. Galveston, Texas.

Q. And what did you do in Galveston, Texas?

A. I was a bartender at the Club 16 on Sixteenth and Strand.

Q. Do you know a man named Senseney in Galveston? A. I did.

Q. Do you know Wesley Kehert? A. I do.

Q. Where did you meet Wesley Kehert?

A. I met Wesley Kehert in Galveston approximately, oh, I don't know, eight, nine months.

Q. Before you came to Alaska?

A. Yes, that's right.

Q. When was the last time you were in Galveston? A. Oh, approximately June 27, '53.

Q. In June of 1953? A. That's right.

Q. Where did you meet Wesley Kehert?

A. Well, the first time I met Wesley Kehert was at a party some friends of mine were giving. He was invited.

Q. Did you see Wesley Kehert prior to the time you left Galveston? A. Oh, yes, several times.

Q. Who did you leave Galveston with?

A. Wesley Kehert. [3]

Q. And where did you meet him when you left?

A. Well, do you mean where did we leave from, what street?

(Testimony of Marilyn Jean Casey.)

A. Yes, where in particular did you meet him when you left Galveston?

A. Down where I was staying. He came down.

Q. Where were you staying at that time?

A. Above the 16 Club, at Sixteenth and Strand.

Q. Where did you go from Galveston?

A. We went to Odessa, Texas.

Q. How did you go to Odessa?

A. In a car.

Q. Whose car was it? A. Wes's.

Q. What type of car was it?

A. 1953 Roadmaster Buick.

Q. What type of license plates did it have?

A. Indiana, I believe.

Q. Do you know the defendant Bennett?

A. Yes, I know him.

Q. Where did you meet him?

A. I met him at Galveston.

Q. When did you meet him?

A. Same time I met Wesley Kehert.

Q. Did Mr. Bennett travel with you and Mr. Kehert from Galveston to Odessa, Texas? [4]

A. Yes, he did.

Q. How long had Mr. Bennett been in Galveston before you left Galveston; do you know?

A. No, I don't.

Q. Had he been there several days before you left?

A. He had been there for quite a while.

Q. Do you know Fern Bennett?

A. Oh, yes.

(Testimony of Marilyn Jean Casey.)

Q. How long have you known Fern Bennett?

A. Approximately a year, a year and a half.

Q. Where did you meet Fern Bennett?

A. Oh, well, I met her through friends of mine, but I can't remember the exact place. I have known her for quite a while.

Q. Do you know what she was doing before she came to Alaska?

A. Gee, I don't know. Her husband was working.

Q. Where were they living?

A. Whenever I met them?

Q. Yes.

A. They were living in the fourth district, Houston, I believe, around there, third or fourth, one.

Q. Did you know Norma Crosby? A. Yes.

Q. Where did you meet Norma Crosby?

A. Met her in Galveston. [5]

Q. When did you meet her?

A. Oh, about a year ago, I guess.

Q. Do you know what she was doing prior to the time she came to Alaska?

A. No. I believe she was a waitress.

Q. Did you see her? Where was she a waitress?

A. I don't know.

Q. Where did you go to in Odessa, Texas?

A. Oh, went by where they were living.

Q. Where who was living?

A. Where Bennett and Fern was living.

Q. I thought you just said that Mr. Bennett and Mrs. Bennett were living in Galveston?

(Testimony of Marilyn Jean Casey.)

A. They were, but they moved to Odessa.

Q. And did you testify that Mr. Bennett and Mr. Kehert were with you when you went to Odessa?

A. I did.

Q. And who was at the place where you went in Odessa; whom did you join in Odessa?

A. Well, like I told you, he stopped by to get his wife.

Q. And where was that?

A. Well, some place they was living. I don't know where it was.

Q. What type of a place was it?

A. It was a motel. [6]

Q. Was there anyone there besides the four defendants?

A. Oh, Mr. Bennett's father and mother lived at the same place.

Q. How did you leave this motel?

A. In cars.

Q. Which car did you leave in?

A. With Wesley.

Q. In which car? A. Buick.

Q. And how did Mrs. Bennett leave the motel?

A. In his car?

Q. Which car? A. Cadillac.

Q. Whose car is that, Mr. Bennett's car?

A. Mr. Bennett's car.

Q. And how did Miss Crosby leave?

A. I don't remember. I believe she went in Bennett's car, I believe.

Q. Didn't Mr. Bennett accompany you?

(Testimony of Marilyn Jean Casey.)

A. He did not.

Q. When did you leave Odessa?

A. Approximately the 28th or 29th of June.

Q. Are you positive of that date?

A. No, I am not.

Q. And were you in the car with Mr. Kehert when you left Odessa? A. Yes, I was. [7]

Q. How far did you travel with Mr. Kehert?

A. Oh, gee, I don't know, until I got tired of his company.

Q. And you said that Miss Crosby was in a Mercury?

A. I haven't said anything about a Mercury.

Q. I beg your pardon; what kind of a car was Miss Crosby in? A. In a Cadillac.

Q. Whose Cadillac was that?

A. Bennett's.

Q. I thought you said that Mr. Bennett was with Mrs. Bennett?

A. Both of them was in the car.

Q. Was there not a third car?

A. There was.

Q. Who was driving that? A. Carroll.

Q. Carroll who?

A. I don't know her last name.

Q. What type of license plate did Jack Bennett's car have? A. Texas.

Q. Do you know the number of it, by any chance?

A. No, I don't.

Q. What was the other car; you have described a Buick and a Cadillac? [8] A. A Mercury.

(Testimony of Marilyn Jean Casey.)

Q. What color was it?

A. Red with a cream top.

Q. What kind of a license plate was on that?

A. Texas.

Q. Do you know who owned that car?

A. I do.

Q. Who owned it? A. Mr. Bennett.

Q. Do you know who owned the Cadillac?

A. Mr. Bennett.

Q. By Mr. Bennett, do you mean the defendant,
or Mr. Bennett's father?

A. I mean the defendant.

Q. Do you know who owned the Buick?

A. Wesley Kehert.

Q. Now, who did you drive with after you got
tired of riding with Mr. Kehert?

A. Carroll, I believe.

Q. How long were you in Odessa, Texas?

A. Oh, approximately twenty-four hours.

Q. Did you leave in daytime?

A. No, because we didn't get in there until late
one afternoon.

Q. What time of day or night did you leave?

A. It was approximately 4:30 one morning. [9]

Q. Was there any reason why you left that
early? A. None that I know of.

Q. Did you go through Denver, Colorado?

A. Yes, we did.

Q. Did you stop in Denver, Colorado?

A. Yes.

(Testimony of Marilyn Jean Casey.)

Q. Where did you, yourself, stop?

A. At the Westward Ho Motel.

Q. Who did you stay there with?

A. Who did I stay with?

Q. That's right. Who was with you at that motel? A. Mr. Kehert.

Q. Where in particular did you stay at that motel? A. Me?

Q. Where did you stay?

A. Well, I guess I stayed in the room.

Q. And who stayed in the room with you?

A. Well, Mr. Kehert.

Q. And how did you register at that motel?

A. I don't know. I didn't sign the register.

Q. Who registered?

A. Mr. Kehert, I guess.

Q. Who paid the bill? A. I paid half.

Q. Who did you pay half to?

A. I gave it to him to pay to the motel [10]
owner.

Q. Did you, yourself, offer to pay the motel owner? A. I did.

Q. Yes?

A. I didn't go in the office. I was getting the luggage out of the car.

Q. And Mr. Kehert paid the motel?

A. Yes, but I gave him half.

Q. Do you know where the others stayed?

A. No, I don't.

Q. Did you ever go to the Royal Motel in Denver? A. Did I ever go to a motel?

(Testimony of Marilyn Jean Casey.)

Q. Yes. A. No, I never did go there.

Q. Do you know where the Western Union office is in Denver?

A. Oh, yes, I have been by the Western Union office; never been in it; don't know what street it is on.

Q. Did you go to the Western Union office with any of the defendants while you were in Denver?

A. In front of it, yes.

Q. Whom did you go with?

A. Mr. Kehert.

Q. Do you know for what purpose Mr. Kehert went to the Western Union office?

A. Well, he needed some money. He sent home for it.

Q. Did he receive some money in Denver?

A. Well, as far as I know he did, but you would have to ask him. I wouldn't say for sure. [11]

Q. Do you know what Mr. Kehert did with this money?

A. Well, I imagine he was getting kind of low on funds and needed some more, so he sent and got it.

Q. Do you know whether Mr. Kehert sent the money himself?

A. Well, as far as I know he did. I didn't borrow any from him.

Q. Do you know whether or not he gave any part of that money to any other person?

A. I don't think he gave it to them.

(Testimony of Marilyn Jean Casey.)

Q. Do you know whether he paid any of that money to Mr. Bennett?

A. He might have let him borrow some.

Q. Do you know of your own knowledge whether or not he did?

A. No, not of my own knowledge. I don't know.

Q. How long did you stay in Denver?

A. Oh, a day and a night.

Q. And did you stay in the same motel?

A. No.

Q. Did you stay somewhere else, Miss Casey?

A. I just told you that I stayed at the Westward Ho Motel.

Q. But you didn't let me finish my question. Did you stay at the same hotel the whole time you were there?

A. Yes. [12]

Q. Did you go with Mr. Kehert or Mr. Bennett to a service station while you were there in Denver?

A. The only service station I went to in Denver was to have the car serviced before we left.

Q. And do you know what the name of that station was?

A. I have no idea.

Q. Did you go alone with either Mr. Kehert or Mr. Bennett to that service station?

A. No.

Q. Who was with you when you went to that service station?

A. Well, we was all there.

Q. And which car did you go to the service station in?

A. In the Buick.

Q. Did you travel in the Buick the whole time, Miss Casey?

A. You mean all the way up here?

(Testimony of Marilyn Jean Casey.)

Q. Yes. A. No.

Q. Did you travel in any other car other than the Buick? A. Yes.

Q. While you were in Denver?

A. Not in Denver, no.

Q. When you left Denver, what route did you take?

A. I don't know what highway it was. [13]

Q. Which towns did you go through; do you remember?

A. Oh, Cheyenne, Wyoming, and Spokane, Washington.

Q. Did you stay in Spokane? A. Yes.

Q. Do you know where you stayed?

A. No, I don't.

Q. With whom did you stay in Spokane?

A. Wesley Kehert.

Q. And were you staying in the same room with him? A. That's right.

Q. Did you stay in the same bed with him?

A. Did I? No, there was two beds in the room.

Q. Who was in the car when you drove from Denver to Spokane? A. Wesley Kehert.

Q. Did you travel in any other car other than Wesley Kehert's car from Denver to Spokane?

A. No, I did not.

Q. Where did you go from Spokane?

A. Over in Canada.

Q. Who were you with when you went from Spokane into Canada?

A. I was with Carroll in the Mercury.

(Testimony of Marilyn Jean Casey.)

Q. Who else was in that car?

A. Just the girls.

Q. By the girls, who do you mean? [14]

A. Fern, Norma, myself and Carroll.

Q. On the way from Spokane to the Canadian border, did you have a conversation with these girls, these two defendants concerning your trip?

Mr. Taylor: Just a moment, your Honor. We are going to object until the proper foundation is laid as to the time and place and who were present, show if it was in the presence of the defendant or either one of them.

Mr. Stevens: Just a preliminary question as to whether or not she had a conversation.

The Court: Objection overruled.

Q. (By Mr. Stevens): Did you have a conversation with the two women who are the defendants on the way from Spokane to the Canadian border?

A. The only conversation we had was about the weather and scenery.

Q. Just answer the question; did you have a conversation with them?

A. Well, naturally.

Q. And who was in the car at the time?

A. The four of us.

Q. Do you remember what time of day it was?

A. No, I don't.

Q. What time did you leave Spokane?

A. It was early in the morning, about nine o'clock. [15]

Q. And there were the four of you in the car?

(Testimony of Marilyn Jean Casey.)

A. That's right.

Q. Now, during that trip, did you discuss prostitution at any time?

A. Prostitution was never discussed any time.

Q. But you say that you drove to the border in the Mercury? A. That's right.

Q. And where was Mr. Kehert?

A. He was in the Buick.

Q. And who was with Mr. Kehert?

A. No one.

Q. And where was Mr. Benett?

A. In the Cadillac.

Q. And who was with Mr. Bennett?

A. No one.

Q. Did some one of the party own a dog?

A. Yes.

Q. Who was it that owned a dog?

A. Fern Bennett.

Q. And how many dogs were there?

A. Three.

Q. And who had the dogs?

A. They were in the Mercury.

Q. And all three dogs were in the Mercury?

A. That's right. [16]

Q. When you crossed the border?

A. That's right.

Q. Who paid for the gas on the trip through the states to the Canadian border?

A. Who paid for it?

Q. Yes.

(Testimony of Marilyn Jean Casey.)

A. Well, I paid my part; as far as I know everyone else did.

Q. Miss Casey, just answer the question, please. To whom did you pay your part?

A. Wesley Kehert.

Q. And when did you pay him?

A. As soon as it was filled and find out what the price was.

Q. And did Mr. Kehert pay for the gas with cash?

A. Part of the time, through the states.

Q. Did Mr. Bennett ever use his credit card or his father's credit card to pay for gas in the car in which you were driving?

A. Well, yes.

Q. Did you pay Mr. Bennet?

A. No.

Q. Did you pay Mr. Kehert?

A. I did.

Q. And did you pay him each time, Miss Casey?

A. I did. [17]

Q. And what about the time when you were riding with the girls between Spokane and the border, whom did you pay then?

A. There was no gas put in the car then.

Q. There was no gas put in the car through Washington?

A. No, there was not.

Q. Did you pass through Orville, Washington, Miss Casey?

A. I don't remember the name. I don't believe.

Q. But you are positive there was no gas bought for the car in which you were driving between Spokane and the Canadian border?

A. No, I'm not positive.

(Testimony of Marilyn Jean Casey.)

Q. Well, if there had been, Miss Casey, who did you pay for your part of the gas?

A. Well, anytime—— (Interrupted.)

Mr. Taylor: Just a moment, Miss Casey. I am going to object upon the grounds that the question is leading and suggestive and also in the nature of cross-examination. This is the government's own witness, your Honor. I have felt a little hesitant about interrupting her, but I think the District Attorney has gone far enough on his leading questions.

The Court: Objection is overruled.

Q. (By Mr. Stevens): Who was driving when you crossed over into Canada? [18] A. I was.

Q. You were driving the car?

A. Yes, I was.

Q. Were you driving the car when you got to the immigration station?

A. You mean where they stopped you?

Q. Yes. A. Yes, I was.

Q. And did you drive the car after you left the immigration station? A. Yes, I did.

Q. How far did you drive that car?

A. Approximately one hundred fifty, two hundred miles.

Q. Did you stop at any place just a few miles past the border to join up with the other cars?

A. No, we had no reason.

Q. When did you cross the Canadian-Alaskan line; do you know, Miss Casey?

A. Approximately June 29th.

(Testimony of Marilyn Jean Casey.)

Q. And what car were you in when you crossed this line? A. Mercury

Q. And who was driving that car?

A. I was.

Q. And were you driving when you came to the American immigration station at Tok?

A. Yes, I was. [19]

Q. And who was with you in that car?

A. Fern, Norma and Carroll.

Q. The four women? A. That's right.

Q. And where was Mr. Bennett?

A. In the Cadillac.

Q. And where was he in relation to you; was he ahead of you or behind you?

A. Well, the cars went through. He went through and then we went through and then Wes came through.

Q. And going back to the American-Canadian border, do you remember the town at which you went through Canadian immigration?

A. No, I don't.

Q. Who went across that border first?

Mr. Taylor: If the Court please, we are going to object, incompetent, irrelevant and immaterial, can't see where that has any bearing upon the issues.

The Court: Objection overruled.

Q. (By Mr. Stevens): The question is, Miss Casey, who in relation to the automobiles went across first? A. I don't remember.

Q. You stated that Mr. Bennett was driving the

(Testimony of Marilyn Jean Casey.)

Cadillac, Mr. Kehert was driving the Buick and you were driving the Mercury?

A. That's right. [20]

Q. Could you tell us the order in which those cars crossed the Canadian-American border?

A. I don't want to say because I'm not sure.

Q. Did you when you passed through the Canadian-Alaskan border drive the Mercury through?

A. I did.

Q. And did the car in which you were riding stop at Tok Junction? A. It did.

Q. And who was registered as the driver of the car at Tok Junction? A. I was.

Q. Did you drive in the Mercury all the way through Canada?

A. Oh, majority of the way, yes.

Q. With whom did you ride when you were not in the Mercury? A. Wesley Kehert.

Q. Did you ever ride with Mr. Bennett?

A. No, I never did.

Q. When did you get to Fairbanks?

A. June the 30th.

Q. And where did you go when you got to Fairbanks; where did you stay?

A. Transient Rooms.

Q. Did you stay in Fairbanks permanently at that time? [21] A. What do you mean?

Q. You got to Fairbanks I believe you said on the 30th of June? A. Yes, that's right.

Q. Did you stay in Fairbanks at that time?

A. Why, yes.

(Testimony of Marilyn Jean Casey.)

Q. And how long after you got here did you stay here? A. Well, until July the 4th.

Q. Did you accompany any of the defendants back to the 40 Mile roadhouse?

A. Oh, we took a drive down there one evening.

Q. Did you stay down there? A. Yes.

Q. How long did you stay down there?

A. One night.

Q. And when you returned, where did you stay?

A. Transient Rooms.

Q. And who else stayed at the Transient Rooms with you? A. Wesley Kehert.

Q. In what room did you stay?

A. I don't remember the number.

Q. Were you staying in the same room that Mr. Kehert was staying in? A. That's right.

Q. And at that time were you sleeping in the same bed that Mr. Kehert was sleeping in? [22]

A. That's right.

Q. And did you engage in any act of sexual intercourse with Mr. Kehert? A. We did not.

Q. Do you know Vern Murphy? A. I do.

Q. Where did you meet Vern Murphy?

A. While I was dancing at the Squadron Club.

Q. Did you see Mr. Murphy at any time immediately after you came to Fairbanks?

A. I did not.

Q. Did you ever stay in a place owned by Mr. Murphy? A. I did.

Q. And what place was that?

(Testimony of Marilyn Jean Casey.)

A. Cabin Number 12 at the Motel. He owns the Trail's End.

Q. And who rented that Cabin Number 12?

A. Who rented it?

Q. Yes. A. Mr. Kehert.

Q. And from whom did he rent the cabin?

A. I don't know. Mr. Murphy, I guess.

Q. Do you know what the price, the rent of the cabin was? A. I have no idea.

Q. And did you stay in that cabin?

A. I did. [23]

Q. I thought you just testified that you stayed in the Transient Rooms, Miss Casey?

A. If you will give me a chance, I will tell you why.

Q. Were you staying in the same place at both times, Miss Casey?

A. No, I stayed in the Transient Rooms the first time, the two nights in Fairbanks, and Mr. Kehert and I had a fuss and that's why he rented me the cabin, so I could move out.

Q. When you went to the Transient Rooms, did you engage in any acts of prostitution in those rooms? A. I did not.

Q. Have you entered into acts of prostitution since you have been in Fairbanks? A. I have.

Q. How soon after you arrived in Fairbanks did you enter into acts of prostitution?

A. About three days.

Q. And where was that?

A. Trail's End Motel.

(Testimony of Marilyn Jean Casey.)

Q. I thought you just said you never entered such an act there?

A. You said Transient Rooms.

Q. I beg your pardon, I meant the Trail's End Motel?

A. Well, you said Trail's End Motel.

Q. What did you do with the money you gained by this practice? [24]

A. I kept it.

Q. Did you give any part of that money to either of the defendants?

A. I did not.

Q. Who paid for your room rent out there?

A. Well, I paid for it.

Q. I thought you just said Mr. Kehert paid for it?

A. He paid for the first two nights.

Q. Did Mr. Bennett come down to see you at that Trail's End Motel?

A. He never did.

Q. Were you using a car at the time you were living at the Trail's End Motel?

A. Yes, I had a car.

Q. Which car were you using?

A. I had the Buick.

Q. Mr. Kehert's Buick?

A. Yes.

Q. Where were the others living, the other people who came to Alaska with you?

A. I don't know. Fifth Avenue I think they were staying.

Q. The Fifth Avenue Hotel?

A. I believe so.

The Clerk: Government's Identification No. 1; Government's Identification No. 2; Government's Identification No. 3. [25]

(Testimony of Marilyn Jean Casey.)

(Three (3) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 1, 2, and 3, respectively.)

Mr. Stevens: If we may, your Honor, there are quite a few. May the Clerk mark these as we continue.

The Court: Very well.

Mr. Stevens: Would you like to see these, Mr. Taylor?

Mr. Taylor: Yes, I sure would.

The Clerk: Government's Identification No. 4; No. 5; No. 6; and No. 7.

(Four (4) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification No. 4, 5, 6, and 7, respectively.)

Q. (By Mr. Stevens): Miss Casey, these are Government's Identifications 1, 2, 3, and 4. Would you look at those, please. Will you tell us what these are, please?

Mr. Taylor: Just a moment, your Honor. We are going to object to any testimony regarding these pictures until the proper foundation has been laid for the introduction of them.

The Court: Objection overruled.

Q. (By Mr. Stevens): Will you tell us what these are, please? A. They are pictures. [26]

Q. Do you know who took these pictures?

(Testimony of Marilyn Jean Casey.)

A. Well, all of us took some of them.

Q. Whose camera was used to take these pictures?

A. Oh, excuse me. We bought a little camera, a little Brownie camera.

Q. Was that your camera, Miss Casey?

A. It was, yes.

Q. And where did you buy that camera; do you remember?

A. I don't remember the name of the town, but it was a very small place.

Q. In what state?

A. In Washington before I crossed the Canadian—bought it at a drug store, paid \$2.49 for it, I believe it was.

Q. It was your camera? A. Yes, it was.

Q. After you got to Alaska did you still have that camera in your possession?

A. It was still with my things that I hadn't moved, I believe, at the Transient Rooms.

Q. And was that the same room that you testified you were sharing with Mr. Kehert?

A. That's right.

Q. And did you have photographs there in the room with you?

A. I only had one photograph.

Q. Did you have film that had been taken on the way up? [27] A. That's right.

Q. And was that film in the room in the Transient Rooms with the camera?

A. I believe it was, yes.

(Testimony of Marilyn Jean Casey.)

Q. Now, if you will take these pictures in order. Will you tell us if you remember who took those pictures?

A. Well, the first one I have here is this one of Bennett, Mr. and Mrs. Bennett. I took that one. The second picture I have here is of Norma Crosby. I also took that. The third picture I have here is of me and Mr. Kehert, and I believe I had Mrs. Bennett to take that one, and I have one here of Mr. Kehert, Carroll and Mrs. Bennett, and I took that one.

Q. Now, do these pictures show the automobiles in which the group was traveling?

A. It shows some of them.

Mr. Taylor: Miss Casey, don't answer that question until the objection is made. I object, your Honor, because they have not been introduced in evidence. They have only been identified to a certain extent. If they make further examination as to when and where they were taken should not be indulged in until such time as they have been admitted in evidence.

The Court: Objection overruled.

Q. (By Mr. Stevens): This is Identification 5, 6, and 7, Miss Casey. Would you tell us what those are? [28]

A. Well, this one——

Q. More of the same pictures?

A. Yes, that's right.

Q. And who are in those pictures and who took them, if you please?

(Testimony of Marilyn Jean Casey.)

A. This is a picture of myself, myself, Miss Crosby, Carroll, Mr. Kehert, and I believe I had Mrs. Bennett take this picture. This one is a picture of Mr. Kehert, Miss Crosby and Carroll and Mrs. Bennett. I snapped this one. This is a picture of Miss Crosby, Miss Carroll, myself and Mrs. Bennett. I believe that Wesley took that one.

(Three (3) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 8, 9, and 10, respectively.)

Mr. Stevens: Did you see the rest of these, Mr. Taylor? Would you like to see them?

Q. (By Mr. Stevens): This is Government's Identification 8, 9 and 10. Would you identify those for us, please?

A. Yes, this is a picture of Mr. Bennett. I took that. I have here a picture of Carroll, Mrs. Bennett and Miss Crosby. I also took that. I have here a picture of Wesley Kehert. I took that one also.

Q. And are these a part of the same set of pictures?

A. Yes, they are. I took approximately four rolls of them, I believe. [29]

(Two (2) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 11 and 12, respectively.)

Q. (By Mr. Stevens): Will you identify Government's Identification 10 and 11, please?

(Testimony of Marilyn Jean Casey.)

A. I have here a picture of myself. I believe that Mrs. Bennett took that one. This picture of the town and this man walking across the street, I took that one myself.

(Two (2) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 13 and 14, respectively.)

Q. (By Mr. Stevens): This is Government's Identification 13 and 14. Would you identify those, please?

A. Yes, this is a picture of Mr. Kehert and Mr. Bennett and an iceman. I took that picture and this is a picture of Mr. Bennett and Mr. Kehert. I took that also.

(Three (3) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 15, 16, and 17, respectively.)

Q. (By Mr. Stevens): This is Government's Identification 15, 16 and 17, Miss Casey. Would you identify those pictures for us, please?

A. This is a picture of Miss Crosby and Mr. Bennett. [30]

Q. Can you identify those pictures as part of the same group of pictures? A. Yes, I can.

Q. And were those pictures also taken on the trip coming up here?

A. Yes, they were, and here is a picture of a

(Testimony of Marilyn Jean Casey.)

bridge that was broken. They were repairing this bridge and I took this picture. This picture of myself here, Mr. Kehert took this.

(Two (2) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 18 and 19, respectively.)

Q. (By Mr. Stevens): Government's Identification 18 and 19. Would you identify those also, please?

A. This picture here of Mrs. Bennett and Mr. Kehert, I took that, and I have here a picture of Carroll, Mrs. Bennett and Miss Crosby and Mr. Bennett. I took this.

(Three (3) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 20, 21, and 22, respectively.)

Q. (By Mr. Stevens): This is Government's Identification 20. Would you identify that, too, please?

A. That is Carroll and Miss Crosby. I took this picture also. [31]

Q. That is Government's Identification 21, I believe, is it not?

A. Yes. This is a picture of the part of the machinery that was repairing this bridge that was broken. I took this picture.

Q. This is Government's Identification 22?

(Testimony of Marilyn Jean Casey.)

A. This is also part of the equipment. This is where they were driving a, oh, a piece of wood down this bridge, and I took this picture also.

Q. Did you take those pictures?

A. Yes, I did.

(Three (3) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 23, 24 and 25, respectively.)

Q. (By Mr. Stevens): And this is Government's Identification 23. Was this taken at the same location as the last two you have in your hand?

A. Yes, it was.

Q. Who is that a picture of?

A. That is a picture of myself.

Q. Who took that picture?

A. Mr. Kehert.

Q. Was that taken with the same camera?

A. Yes.

Q. On the same trip? [32] A. Yes.

Q. Government's Identification 24 and 25, Miss Casey?

A. This is just as they got the bridge repaired. I snapped a picture of that. Just as they got enough room for a car to go through and this is a picture I took of the sign as it says Alaska, as you leave Canada and come into Alaska.

Q. Was that picture taken while the car was moving, Miss Casey?

(Testimony of Marilyn Jean Casey.)

A. This one? No, I stopped and got out of the car and took it.

(Two (2) snapshot photographs taken on trip from Texas to Alaska were marked Government's Identification Nos. 26 and 27, respectively.)

Q. (By Mr. Stevens): This is Government's Identification 26 and 27, Miss Casey?

A. Yes, this is a picture of myself that was taken at the same bridge. This is another picture of myself taken at the very same place.

Q. With the same camera?

A. Yes, it was.

Q. On the same trip? A. Yes.

Q. Whose camera was it? A. It was mine.

(Two (2) snapshot photographs taken on trip from Texas to [33] Alaska were marked Government's Identification Nos. 28 and 29, respectively.)

Q. (By Mr. Stevens): This is Government's Identification 28?

A. This is a picture of myself taken at the same bridge.

Q. Was that taken on the same trip?

A. Yes.

Q. With the same camera? A. Yes, it was.

Q. Who took that? A. Mr. Kehert.

Q. Did you tell the FBI where they could find the camera and pictures, Miss Casey?

(Testimony of Marilyn Jean Casey.)

Mr. Taylor: Just a moment, your Honor. We are going to object as to any statement to the FBI unless the defendants were present. Any conversations with other persons not admissible.

The Court: Objection overruled.

Q. (By Mr. Stevens): Did you tell them where they could find the camera and pictures?

A. No, I believe they found them first and asked me what they were.

Q. You did not tell them that you owned the camera? A. Yes, I did.

Q. I believe, Miss Casey, you testified that you drove [34] the car from Spokane, Washington, to the Canadian border? A. Yeah, that's right.

Q. And you drove through the Canadian immigration yourself? A. That's right.

Q. And approximately a hundred fifty miles past there? A. That's right.

Q. Now, did you also testify that you had——
(Interrupted.)

Mr. Taylor: Just a moment, your Honor. Is this cross-examination? I am going to object to it if it is. Reiteration on direct, now, your Honor. I am certainly going to object.

The Court: Well, I think he is getting too many questions piled up at once.

Mr. Taylor: Just a reiteration of the stuff she has already testified to, your Honor.

The Court: Just don't have too many questions together. One question at a time.

Mr. Stevens: Very well.

(Testimony of Marilyn Jean Casey.)

Q. (By Mr. Stevens): Why did you drive the car across the Canadian border?

A. Because everyone else was tired.

Mr. Taylor: Just a moment, going to object to that, calls for a conclusion of the witness.

The Court: Objection overruled. [35]

Mr. Taylor: Improper attempted cross-examination.

Mr. Stevens: Your Honor, for the record I would like to ask the Court permit this, which is beyond the bounds of proper direct examination.

The Court: I will overrule Mr. Taylor's objection.

Mr. Stevens: You will allow me to go into this then?

The Court: Naturally.

Mr. Stevens: Thank you.

Q. (By Mr. Stevens) Miss Casey, you say you drove across the Canadian-Alaskan border also?

A. That's right.

Q. Why did you drive across that border?

A. Because the majority of the time they were driving and I didn't trust their driving anyway.

Q. Did you drive with anyone else between the time crossing the Canadian-American border and crossing the Canadian-Alaskan border, through Canada in other words?

A. You mean where I went, say into Canada and where I came out of Canada?

Q. Did you drive with anyone else other than the people you crossed the two borders with?

(Testimony of Marilyn Jean Casey.)

A. Yes.

Q. Whom did you drive with?

A. Mr. Kehert. [36]

Q. Did you drive with Mr. Bennett?

A. I did not.

Q. And who bought the gas when you were in Canada?

A. Well, if I remember right, I believe that they were using credit cards then, but I paid my part in cash.

Q. And who did you pay your cash to?

A. To Mr. Kehert.

Q. Did you stop anywhere in Canada over night?

A. Yes.

Q. Where did you stop?

A. Well, I can't remember the exact places because I don't know them.

Q. How many nights in Canada did you stop?

A. Approximately two.

Q. And where did you stay each night when you stopped?

Mr. Taylor: We object to the question, your Honor, as not competent, relevant or material to the issues, where they stopped crossing Canada.

The Court: Objection overruled.

Q. (By Mr. Stevens): Where did you stay in relation to the other people in the party?

A. What do you mean?

Q. Did you stay with any one of the defendants on either of the two nights when you stopped in Canada?

(Testimony of Marilyn Jean Casey.)

A. Do you mean did I sleep with them? [37]

Q. Well, did you stay in the same place with them, first? A. Yes.

Q. Who was that?

A. You know how the roadhouses are in Canada, if you are going to get a room you have got to get it all there.

Q. Who did you stay with, Miss Casey?

A. I stayed in the room with Wesley Kehert, but we always had twin beds.

Q. That was the same way both nights?

A. Yes, the second night we got one with a full-sized bed and a cot.

Q. Which bed did you sleep in that time?

A. The large bed.

Q. How long did you work in the City of Fairbanks as a prostitute, Miss Casey?

A. Approximately two days.

Q. And how much money did you earn?

Mr. Taylor: Just a moment, your Honor, we are going to object to the question as incompetent, irrelevant and immaterial, has no bearing on the case at issue. I think to prove that, your Honor, you would have to be specific, it would have to be specific acts of prostitution rather than a general statement.

The Court: Objection overruled.

Q. (By Mr. Stevens): The question is about the money, how much money did you earn? [38]

A. Approximately three hundred dollars.

Q. What did you do with that money?

(Testimony of Marilyn Jean Casey.)

A. I kept it.

Q. Did you keep it all?

A. All except what my expenses were, yes.

Q. Isn't it a fact, Miss Casey, you told the FBI you gave it to Mr. Kehert?

A. That's the story they wanted.

Mr. Taylor: Just a moment, your Honor, we are going to object to that question as improper direct examination. Nothing used to show that she had made contrary statements.

The Court: Well, the foundation isn't well laid. For that reason, I will sustain the objection until it is better laid.

Q. (By Mr. Stevens): Miss Casey, you were staying with Mr. Kehert when you came to Fairbanks? A. That's right.

Q. And did you engage in prostitution after you came to Fairbanks, immediately after you came to Fairbanks? A. Not immediately after, no.

Q. Well, within a relatively small period of time after you came to Fairbanks? A. Yes.

Q. And you stated at that time you were staying at the Trail's End Motel, or whatever that motel is? [39] A. Yes, that's right.

Q. Who paid the rent out there, Miss Casey?

A. Like I told you. He said he would get me started. He told me to go down and get a job dancing at the Squadron Club, which I didn't do.

Q. Who was it said that to you?

A. Mr. Kehert.

(Testimony of Marilyn Jean Casey.)

Q. Now, again I ask you, Miss Casey, did you give any of the money you earned by acts of prostitution to Mr. Kehert?

A. No, not earned by acts of prostitution, no.

Mr. Stevens: May we have a ten-minute recess, your Honor, at this time?

The Court: Yes, we will take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:55 p.m., the court took a recess until 4:07 p.m., at which time the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well. Proceed.

MARILYN JEAN CASEY

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination. [40]

Q. (By Mr. Stevens): Miss Casey, have you made a statement to anyone inconsistent with the statement you have made to the court and the jury today, inconsistent with the facts you have been questioned about so far?

A. Well, only to get out of jail.

Q. The question was, did you make a statement

(Testimony of Marilyn Jean Casey.)

inconsistent with your testimony before this court today?

A. Yeah, I did.

Q. And to whom did you make that statement?

A. Mr. Harkabus, Mr. Worsham, Mr. Gore.

Q. Where did you make the statement?

A. In the FBI office.

The Clerk: Government's Identification No. 30.

(Statement (6 pages) dated July 6, 1953, and signed by the witness, Marylian Jean Casey, was marked Government's Identification No. 30.)

Q. (By Mr. Stevens): Do you remember the date on which that statement was made, Miss Casey?

A. Must have been the 8th or 9th of July.

Q. You know it was in July? A. Yes.

Q. I hand you Government's Identification 30 which is dated the 6th day of July; can you identify that for us?

A. Yes. [41]

Q. Is that a statement you have made?

A. It is.

The Court: What year was it made?

The Witness: 1953.

Q. (By Mr. Stevens): And where were you when you made this?

A. In the FBI Office.

Q. Here in Fairbanks, Alaska? A. Yes.

Q. Would you care to explain the inconsistencies between this statement and your statement before the court today?

A. Part of the statement is true, about the trip. The other part I told so I could get out of jail.

(Testimony of Marilyn Jean Casey.)

Q. You were in jail at the time? A. I was.

Q. And you made this statement to get out of jail? A. I certainly did.

Mr. Stevens: Would you like an opportunity to read this, your Honor.

Q. (By Mr. Stevens): On Government's Identification 30 there appears the initials "M.J.C." in many places; did you write those? A. I did.

Q. Did you read that statement?

A. I did. [42]

Q. And at the time you made it, did you make it voluntarily?

A. Did I make it voluntarily? You mean with no bribe or anything?

Q. That's right.

A. Well, there was a bribe.

Q. What was the bribe?

A. That I could get out of jail.

Q. And what were you in jail for?

A. They had me booked on operating a bawdy house and vagrancy.

Q. And who else was with you in jail?

A. Miss Crosby.

Q. And at that time you made this statement?

A. Yes.

Q. Who offered you the so-called bribe, Miss Casey? A. Well, the FBI.

Q. And what did they tell you?

A. They told me that if I would go ahead and tell them that Wesley Kehert and the rest of them had transported me to this country for prostitution

(Testimony of Marilyn Jean Casey.)

that Mr. Gore would have the charges dropped against me, and I would be released from jail, and said that anything I testified to I could not be prosecuted for.

Q. In other words, your testimony is that the FBI asked you to perjure yourself? [43]

A. You mean they asked me to perjure myself?

Q. Yes. A. No.

Q. Isn't that what you just said?

A. It's not. You asked me to tell you what the bribe was, and that's what I told you.

Q. Were you not asked to tell the truth concerning your transportation to Alaska?

A. Well, it didn't seem like they was particular or not as long as they could get these people. I don't know what they wanted them for.

Q. Did you read the sixth page of this statement where it says "I have dictated this 6 page signed statement. I have read it. It has been read to me. I have initialed each page and each correction, and signed this the last page with my signature. To the best of my knowledge and recollection, the facts contained in this statement are true and correct."?

A. I did.

Q. You read that and signed it?

A. Certainly.

Q. And you signed it in the presence of Mr. Harkabus and Mr. Worsham?

A. I did.

Q. And had those individuals identified themselves to you as FBI agents?

A. They had. [44]

(Testimony of Marilyn Jean Casey.)

Q. And in this statement did you tell the FBI that Wesley Williams had said to you, "I hear you are thinking of turning out"?

A. Did I say that?

Mr. Taylor: Just a moment, your Honor. We are objecting to any question as to any Wesley Williams.

Q. (By Mr. Stevens): Whom do you know as Wesley Williams, Miss Casey?

A. I know nobody by the name of Wesley Williams.

Q. This statement was dictated by you, Miss Casey?

A. Yes.

Q. And did the FBI know Wesley Williams; did they supply the name to you?

A. They got it off another piece of paper they had there or something, something they had got out of Anchorage.

Q. Is it not true that you said right in the statement that you know Wesley Williams as Wesley Kehert now?

A. No, Steve Williams.

Q. This statement says on Page 2, "at approximately 1:30 p.m., this date"—(Interrupted.)

Mr. Taylor: Just a moment, Mr. Stevens. I am going to object. I believe that the witness should be shown the statement if he is going to examine her about it, and not stand over there and possibly read some fictitious matter.

Mr. Stevens: Are you accusing me of reading some fictitious matter, Mr. Taylor? [45]

The Court: Go ahead, Mr. District Attorney.

(Testimony of Marilyn Jean Casey.)

Q. (By Mr. Stevens): To continue, it says, "this date I drove Wesley's car a 1953 2-tone green Buick 2-door which bore 1953 Indiana license WBA 8357 from Galveston, Texas, to Houston, Texas. Jack Bennett and Wesley Williams were with me." Is not Wesley Williams known to you as Wesley Kehert now, and the defendant in this case?

A. That's right.

Q. And did you tell the FBI what it says in this statement here, that Wesley Williams said, "I hear you are thinking of turning out," and "He said, 'if you are, you better come to Alaska with us. Don't fool around with these \$5 tricks, they are getting \$20 up there.' " Did you tell the FBI that statement?

Mr. Taylor: We are going to object to this question, your Honor, incompetent, irrelevant and immaterial. Made before the matters set forth in the Indictment. As far as the three defendants are concerned, there is no showing who was there and in whose presence the conversation was had.

The Court: You will show before you offer the paper in evidence, you will show certain things that will make it admissible, will you?

Mr. Stevens: The statement, your Honor?

The Court: Yes.

Mr. Stevens: I will call your Honor's attention to [46] our Statute, Section 58-4-59 which states we may not impeach our own witness, but we may con-

(Testimony of Marilyn Jean Casey.)

tradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 58-4-62. In compliance with Section 58-4-62, "but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them." I have complied with both sections, your Honor. This is not hearsay. The hearsay rule is not involved. We do not believe and we are prepared to offer authorities to the court for that extent. This is the presentation of prior inconsistent statements of our own witness and not impeachment.

The Court: Well, to lay a foundation at any time you have to show the time, place and persons present.

Mr. Stevens: We have done that, your Honor. Miss Casey has said where the statement was made, who was there, and when it was made.

The Court: It seems to me the FBI people to whom she made the statements should be put on the stand and the matter cleared up before it is offered in evidence.

Mr. Stevens: That is true, your Honor. This time we are just asking Miss Casey whether she made the statements. [47]

Mr. Taylor: If the court please, I would like to

(Testimony of Marilyn Jean Casey.)

call the court's attention to the fact that the District Attorney was attempting not to establish whether or not she made the statement in the paper or Identification 30, I believe it is, but was going back and examining her as to when and where the statement was made or the conversation was had between Mr. Kehert and this witness. I think it can only go as to whether she made the statement to the FBI, not the circumstances of the conversation, of the text.

The Court: Objection overruled.

Mr. Stevens: Will you read the last question?

(The reporter read the last question as follows: "And did you tell the FBI what it says in this statement here, that Wesley Williams said, 'I hear you are thinking of turning out,' and he said, 'if you are, you better come to Alaska with us. Don't fool around with these \$5 tricks, they are getting \$20 up there.' Did you tell the FBI that statement?")

A. Yeah, but it wasn't true.

Q. At this time you tell us it is not true?

A. I do.

Q. But you did tell the statement to them at that time? A. I did.

Q. And when did you get to Alaska?

A. June the 29th or 30th.

Q. You had been here six days; is that right?

A. That's right. [48]

Q. Would you like an opportunity to reread this

(Testimony of Marilyn Jean Casey.)

statement, Miss Casey? A. No, I wouldn't.

Q. Miss Casey, did you make this statement to the FBI, "They, Jack Bennett and Wesley Williams, discussed crossing the Canadian border on several occasions, while we were on this trip. Both of them stated that they are known by the customs officials and stated that all girls should stay in one car. Before we crossed the line into Canada, I recall that Bennett stopped at a small town where he purchased a plastic picnic set and other groceries." Did you make that statement?

A. Would you read that again, please?

Q. "They, Jack Bennett and Wesley Williams, discussed crossing the Canadian border on several occasions, while we were on this trip. Both of them stated that they are known by the customs officials and stated that all girls should stay in one car. Before we crossed the line into Canada, I recall that Bennett stopped at a small town where he purchased a plastic picnic set and other groceries."

A. No, I didn't say that.

Q. You didn't say that? A. No, I did not.

Q. You recall that on page 6 this statement says, "I have dictated this 6-page signed statement. I have read it. It has been read to me. I have initialed each page and each [49] correction, and signed this, the last page, with my signature. To the best of my knowledge and recollection, the facts contained in this statement are true and correct"?

A. Yes.

Q. You had read the statement?

(Testimony of Marilyn Jean Casey.)

A. Well, I was in a hurry to get out. I mean I didn't read it real thoroughly, no.

Q. Miss Casey, on Page 4 there is a sentence crossed out with "M.J.C." written about it, did you write that? A. Yes.

Q. Is not that sentence right the next sentence behind the section I have just read to you, the three sentences I have just read to you?

A. That's right.

Q. You read it closely enough to cross out one whole sentence?

A. I was not reading it, crossing out sentences. They was glancing over showing me the mistakes.

Q. What was the mistake about, "I bought a pair of peddle pushers"? A. Yes.

Q. Each change and each place you put your initials is where the FBI told you to, Miss Casey?

A. When I was making the initials over the mistakes there I was not reading the statement. I was only picking out the mistakes. [50]

Q. Was it a mistake to write, "I bought a pair of peddle pushers"? A. They said it was.

Q. So you crossed it out?

A. They crossed it out and I initialed it.

Q. Did you tell the FBI prior to Norma Crosby driving in the Mercury (interrupted)——

Mr. Taylor: Now, just a moment. Your Honor, I am going to object. I believe that the District Attorney should show the witness that paper and call her attention to the particular statement he is going to interrogate her about.

(Testimony of Marilyn Jean Casey.)

The Court: She is entitled to look at the paper if she wants to at any time. She has waived it heretofore. If you want to see the paper, look it over before you answer, after he has given you the question, speak right up and ask for it.

The Witness: All right.

Q. (By Mr. Stevens): Miss Casey, again from Page 4, it says, "Prior to Norma Crosby's driving the Mercury in which I was a passenger across the Canadian Border, it had been discussed by the girls, Norma Crosby, Fern Bennett, Carole and myself, that we were to travel to Alaska and work as prostitutes. Norma had knowledge that all the girls were to work as prostitutes. About fifty miles after we crossed the border, we stopped along the highway and changed cars again." Did you tell the FBI that statement? [51]

A. Yes, but it wasn't true either.

Q. Had you read the statement at the time the statement was made?

A. You mean after the statement was made?

Q. Yes, the whole statement?

A. Yes, I read it.

Q. Was it read to you? A. No, I read it.

Q. Did you sign it? A. I did.

Q. And these initials, "M.J.C.," again are your initials? A. That's right.

Q. Miss Casey, did you also make a statement before Mrs. Nordale, the United States Commissioner, in connection with this case? A. I did.

(Testimony of Marilyn Jean Casey.)

Q. And who was with you when you made that statement?

A. Mr. Harkabus, Mr. Worsham, Mrs. Nordale and myself.

Q. And at that time, were you coerced to make that statement?

Mr. Taylor: Now, just a moment, your Honor, I think the time and place, or the time particularly should be brought out from this witness.

The Court: I do, too. Lay your foundation in any order you want to.

Q. (By Mr. Stevens): Were you coerced in any way at that time? [52]

A. I wasn't out of jail yet, if that's what you mean.

Q. Who told you what to say in that statement?

A. Well, no one told me what to say. That statement was already typed out whenever I signed it.

Q. What time was it when you made that statement?

A. That was on the 7th of July, 1953, approximately, oh, I believe it was in the afternoon.

Q. And there were just the four of you present?

A. That's right.

Q. And did not Mrs. Nordale ask you if you swore that the statement was true?

A. That's right.

Q. And did you swear before Mrs. Nordale, the U. S. Commissioner, that that statement was true?

A. I did.

Mr. Taylor: Just a moment, your Honor. I am

(Testimony of Marilyn Jean Casey.)

going to object to that. I believe Mrs. Nordale would be the best witness as to what was said. None of the defendants were present.

The Court: Objection overruled.

Mr. Stevens: I am sorry for the delay, your Honor. The statement was here, but it seems to be in my office. May we have just a delay of a couple of minutes, your Honor? Mr. Yeager is getting the statement.

The Clerk: Government's Identification No. 31.

(Affidavit signed by Marylian Jean Casey, dated July 8, 1953, [53] was marked Government's Identification No. 31.)

Q. (By Mr. Stevens): This is Government's Identification 31, Miss Casey. Did you sign that document? A. Yes, I did.

Q. Have you read it, Miss Casey?

A. Yes, I have.

Q. Is that a copy of the statement which you made to Mrs. Nordale?

A. I made two statements to Mrs. Nordale. The statement was already typed out when I went up before her.

Q. This is dated the 8th day of July?

A. That's right.

Q. The other statement was dated the 6th of July? A. Yes.

Q. The FBI then prepared this statement for you? A. That's right.

Q. Did you read it as an affidavit before you

(Testimony of Marilyn Jean Casey.)

signed it? A. It was read to me.

Q. It was read to you, and did you swear to this statement before Mrs. Nordale? A. I did.

Q. You swore to her that the statements were true? A. That's right.

Q. Now, Miss Casey, going back to Odessa, Texas, did Mr. Bennett's father accompany you any part of the way as you left Odessa? [54]

A. I believe that he took a couple of suitcases to Mrs. Bennett about a block down to where his other car was parked.

Q. Just about a block?

A. Yeah, that's right.

Q. And which other car was it that you went to?

A. Mercury.

Q. And was that Mr. Bennett's car?

A. It was.

Q. Did you tell us what color that car was?

A. I did. I told you it had a red bottom and a cream top.

Q. What color was the Cadillac? A. Blue.

Q. And what color was the Buick?

A. Green, two-tone.

Q. On Page 3 of Government's Identification 30 it states, "I stayed with Wesley Williams at the Westward Ho, on U. S. Hwy. 85, No. 87, 1744 South Santa Fe Drive. We stayed there one night only. I don't remember how Wesley Williams registered. At approximately 11:30 a.m., June 22, 1953, Wesley Williams picked up a \$1,000 Western Union Money Order. I know this because Jack Bennett and I

(Testimony of Marilyn Jean Casey.)

accompanied him to the Western Union office. We drove to the Troyal Motel and picked up the other girls." Did you tell that to the FBI?

A. Let me see it. [55]

Q. Would you like to read the whole thing, Miss Casey?

A. No. Yes, I told them the name of the motel, but they was the ones that picked out the highway, where it was located, and as far as the money, he was getting kind of low and needed some more money to get up here, I guess.

Q. The words, "at Denver," are written in there, are they not? A. Yes.

Q. Did you write them in there?

A. Yes; I told you we went to the Western Union.

Q. Would you like time to read the whole statement, Miss Casey? A. No.

Q. On page 5, Miss Casey, it states, "The first night I worked as a prostitute was June 30, 1953. I worked out of the Southside Bar located on 15th and Cushman. I turned six tricks at \$20 each. I earned \$120. I gave it all to Wesley Williams. Williams, in turn, gave me \$4 back and said if I had the rest of the money I would just spend it. I took the tricks to a cabin located across from the Transient Rooms. This cabin was rented by Wesley Williams from Murphy." Would you like to read that, too? A. No.

Q. Did you tell that to the FBI?

A. Did I?

(Testimony of Marilyn Jean Casey.)

Q. Yes. [56] A. Yes, but it wasn't true.

Q. What wasn't true?

A. The only part of that that is true is that I was getting ready to reside at the Trail's End Motel, but of any prostitution money, I didn't give Wesley Kehert any part of it.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: It is getting pretty hot and uncomfortable in here. If the court please, it is a short time until 5:00 o'clock. I wonder if we could recess until 10:00 o'clock in the morning?

The Court: I think you should utilize the next twenty minutes.

Cross-Examination

By Mr. Taylor:

Q. Miss Casey, when did you first decide to engage in prostitution in Fairbanks?

A. Well, I decided myself because I didn't want—pay me ten dollars a night to dance at the Squadron.

Q. Where did you first make that decision?

A. Well, I made that decision myself about a day after I got up here, I guess.

Q. So that you didn't have any knowledge at the time that you left Texas or any time prior to reaching Fairbanks to go into prostitution then?

A. No. No, I had no idea. I did that myself. [57]

Q. Now, just state to the jury and the court what the conversation was between you and any of

(Testimony of Marilyn Jean Casey.)

these defendants that brought you to Fairbanks, and where it took place?

A. Well, between Mr. Kehert and myself before we left Fairbanks we had very good intentions coming up here to get married and after we got here we had quite a few fusses on the way. That's why I mostly rode a car with other people, and after I got here and was booked on prostitution and although it was never proven he wouldn't have nothing else to do with me.

Q. And what conversation did you have with any of the other defendants about practicing prostitution?

A. There was none.

Q. And just state what talks you had about riding to Fairbanks?

A. Well, all this talk that we had was that even in Texas we were engaged to each other in Texas, and due to the fact that it was—well, my parents, you know, was going to kind of object to it, and rather than to fall out with them and everything, I mean, I had some money saved so I just suggested taking a trip, and (interrupted)—

Q. And did you suggest to them or ask them if you could ride in their cars?

A. Well, I was the one that started it, the idea of coming to Alaska.

Q. Oh, you were? [58]

A. Yes.

Q. And so on the trip up then, you first went from, I believe you went from Galveston, Texas, to Houston, Texas, or Odessa, Texas?

A. Yes, that's right.

(Testimony of Marilyn Jean Casey.)

Q. How far is those two towns apart?

A. Well, let's see, Galveston is an island in the Gulf of Mexico, and Odessa is approximately two hundred fifty miles from Galveston, I guess.

Q. And was Mrs. Bennett in Houston at the time that you saw her?

A. No, she was in Odessa.

Q. And when did you first see Mrs. Bennett?

A. Well, I had known Mrs. Bennett for approximately a year, or a year and a half prior to that time.

Q. When was the first time that you saw Mrs. Bennett after you left Galveston?

A. In Odessa.

Q. And was there any talk about coming to Alaska?

A. Well, the only talk there was was that I told them that I wanted to come to Alaska and just talked it over, and so they decided that would be just as good a place to go for a vacation trip as any.

Q. So then your first idea of coming to Fairbanks was more or less in the nature of a vacation?

A. Yes, it was. [59]

Q. Was there any talk between you and any of these defendants as to your practicing prostitution in Alaska for them?

A. Oh, no. No, I didn't even want to mention the fact that even whenever they booked me on prostitution I didn't want to mention the fact to these people that I was.

Q. And, well, then, there was no arrangements

(Testimony of Marilyn Jean Casey.)

made for you going into any house of prostitution prior to coming to Alaska?

A. Oh, no; none whatsoever.

Q. Now, you say that there was, sometimes the gas was paid for by gas coupons?

A. That's right.

Q. And sometimes it was paid for by cash?

A. That's right.

Q. And what arrangements, if any, did you have regarding the payment of your share of the expense of going up, the expense of room and board?

A. Well, I mean, the way I figured it was, I was traveling with Wes and I didn't think it was fair that he pay my way up here, and due to the fact that he had only one car, and I felt it was only in my behalf to furnish gas and oil for the one car, just furnish my own food bill and my own hotel bills.

Q. And I believe you stated you arrived in Fairbanks on the 30th of June, 1953?

A. That's right. [60]

Q. And you went to the Transient Rooms?

A. Transient, yes.

Q. And where is that located?

A. 17th and Cushman. It burned.

Q. And, now, did you associate with Mr. or Mrs. Bennett or Norma Crosby in Fairbanks after you got here?

A. No, I did not.

Q. And you did, you was with Mr. Kehert for a couple of days; is that right?

A. One day.

Q. And have you ever associated with Mr.

(Testimony of Marilyn Jean Casey.)

Kehert or Mr. Bennett or Mrs. Bennett or Norma Crosby since that time? A. I have not.

Q. You have been actually on your own then?

A. That's right.

Q. Now, when you crossed the line between Washington and Canada, how long had you been driving prior to your coming to the Canadian border? A. Alaska and Canada?

Q. No. Canada and the United States.

A. Oh, from Spokane.

Q. You had been driving all the way from Spokane. You know about how far that is from Spokane to the border? A. No. It was quite a ways.

Q. And it just happens you was then driving the car?

A. Yes, because everyone else was tired. [61]

Q. And did you ever have any conversation about switching cars when you got to the border, that you would drive?

A. No; it wouldn't have made no difference what car I was in. Just happened to be there.

Q. Just happened to be you were at the wheel, wasn't it? A. That's right.

Q. Now, you testified to being the owner of a camera that was taken along on that trip?

A. Yes, I did.

Q. And where was—you stated that camera was among your personal effects at the Transient Rooms?

A. Yes; I hadn't moved them out yet.

Q. And do you have that camera now?

(Testimony of Marilyn Jean Casey.)

A. No, I don't.

Q. Do you know where it went?

A. The FBI still has it, I think.

Q. And how did they get the camera?

A. They went out to the rooms and got it.

Q. And did they have a Search Warrant to search your effects?

Mr. Stevens: I object to that, your Honor. I beg your pardon. Did you say her effects?

Mr. Taylor: Yes.

Mr. Stevens: I'm sorry.

A. Not as far as I know, they didn't. [62]

Q. Did they ever serve a Search Warrant on you? A. They did not.

Q. Did they give you a receipt for the camera?

A. They did not.

Q. Did they give you a receipt for the films?

A. They did not.

Q. In other words, they stole the camera from you, is that right? A. That's right.

Q. You had never given them permission to take the camera? A. No, I didn't.

Q. Did you give them permission to develop these films? A. I did not.

Q. When was the first time you saw these films?

A. After they were developed.

Q. Who developed them?

A. I don't know. They took them somewhere and had them developed.

Q. You don't know who developed the films

(Testimony of Marilyn Jean Casey.)

then? A. No, I don't. I have no idea.

Q. Now, when were you first arrested, Marylian, after you got into (interrupted)——

A. On July the 3rd.

Q. What?

A. On July 3rd, approximately 11:00 o'clock at night. [63]

Q. I will hand you some of these exhibits just indiscriminately here and ask you if you made any of this writing on the back of these films?

A. No.

Q. Did you make any writing on the back of any of them? A. I did not.

Q. Do you know who did make the writing on them? A. Yes, I do.

Q. Who made it? A. Mr. Harkabus.

Q. Was Mr. Harkabus present at the time these pictures were taken? A. He was not.

Q. Do you know what mile that was taken on the Alaska Highway? A. No, I don't.

Q. Do you know what mile that was taken?

A. No, I don't.

Q. Do you know whether or not that was in Canada or Alaska, State of Washington, State of Wyoming?

Mr. Stevens: Your Honor, could I ask that Mr. Taylor have these identified by number so the record would be straight?

Mr. Taylor: I am addressing these questions to all of these, your Honor, if she knows where any of them were taken. [64]

(Testimony of Marilyn Jean Casey.)

The Court: Your objection is sustained, Mr. District Attorney.

Q. (By Mr. Taylor): I hand you Government's Identification 15 and ask you to state if you know whether that was in Alaska, Canada, State of Washington, Wyoming? A. I don't know.

Q. Or whether that picture might have been taken prior to leaving Odessa?

A. Well, it could have been taken anywhere.

Q. Then I will hand you Identification 13 and I will ask you the same question. Do you know where that was taken, the milepost on the Alaska Highway or if it was in Washington, Denver, Oklahoma?

A. Well, this was taken in some little town. I don't know where it was.

Q. Might have been in Texas?

A. Might have been anywhere.

Q. O.K. I will hand you Government's Identification 14. I will ask you the same question. Do you know where that was taken?

A. I have no idea.

Q. You don't know whether it was taken on that trip or not then, do you?

A. It was on the trip. I don't know what part.

Q. Might have been in (interrupted)— [65]

A. I wanted these pictures as souvenirs.

Q. And you, on this one, on this picture, did you—Identification 12, did you write anything on the back of that? A. No, I did not.

(Testimony of Marilyn Jean Casey.)

Q. Now, Government's Identification 2, I would like to have you state whether you wrote anything on the back of that. Also, if you know where it was taken?

A. No, I don't.

Q. Also, I would, just a moment. Identification 4, and ask you to state if you put any writing on the back of that?

A. No, I did not.

Q. If you know what milepost in Canada or Alaska it was taken?

A. I don't know.

Q. It might have been taken in the states, is that right?

A. Could have been.

Q. Do you know a man named Steven Williams?

A. Yes.

Q. Well, I will hand you Plaintiff's Identification 5 and ask you to state where that was taken, if you know?

A. I don't know.

Q. Did you put any writing on the back of that?

A. I did not. [66]

Q. O.K., we'll hand you now Government's Identification 6 and ask you if you made any notations on the back of that and also ask you where that was taken?

A. I made no writing on the back, and I don't know where it was taken.

Q. Could have been in Washington, Wyoming, Oklahoma?

A. Could have been.

Q. Now, here is Government's Identification 8; did you put any notations on that one?

A. No.

Q. And did you put on the face of that last picture, did you put some initials, a "B" and "C"?

(Testimony of Marilyn Jean Casey.)

A. No, I did not.

Q. Do you know who did put those on there?

A. Yes, I do.

Q. So that picture is not as it was developed then? A. No, it isn't.

Q. Well, we have Identification, Government's Identification No. 9; do you know, as you, if you made any notations on that? A. No, I did not.

Q. And if you know where it was taken?

A. No, I don't.

Q. O.K. We will have now Government's Identification 10 and ask if you made any notations on the back of that picture and if you know where it was taken? [67] A. No.

Q. And I will ask you the same questions as to Plaintiff's Identification 11 there; anything on that to indicate where it was taken or if you made any notations upon the back of it? A. No.

Q. And also I will ask you the same questions as to Government's Identification 3? A. No.

Q. And I will hand you Government's Identification 7 and ask you if you made any notations on the back of that, or if you made any, put those letters over the various parties shown on the front of the picture? A. No.

Q. And do you know where it was taken?

A. No.

Q. And I will also hand you Government's Identification 1 and ask you where that was taken and if you made any notations either on the back or the face of that picture? A. No, I didn't.

(Testimony of Marilyn Jean Casey.)

The Court: Take a recess any time you want one now, Mr. Taylor.

Mr. Taylor: Yes, your Honor. Like to take it now.

The Court: In a moment we will take an adjournment until 10:00 o'clock tomorrow morning. In the meantime, ladies [68] and gentlemen of the jury, remember not to talk about the case or the parties or to permit anyone to talk about them within your hearing. Keep your minds free from an opinion as to the guilt or innocence of these defendants or each of them until the case is finally submitted to you. Make the adjournment, **Mr. Clerk.**

The Clerk: Court is adjourned until 10:00 o'clock tomorrow morning.

(Thereupon, at 5:00 o'clock p.m., the trial of this cause was adjourned until May 11, 1954, at 10:00 a.m.)

(Be It Remembered, that upon the 11th day of May, 1954, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendants both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.)

The Court: Call the roll of the jury.

(Whereupon the Clerk of the Court proceeded to call the roll.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed now?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. Before we begin, your Honor, may we ask that the mandate in *United States v. Robinson* be spread on the record and the defendant's bondsmen be notified to produce him in court at 1:30? [69]

The Court: It may be so done, and also ordered.

Mr. Stevens: Thank you, your Honor. Miss Casey here? You were on the stand, Miss Casey.

MARILYN JEAN CASEY

the witness on the stand at the time of the adjournment, resumed the stand for further

Cross-Examination

By Mr. Taylor:

Q. Miss Casey, you stated yesterday that you had known Norma Crosby in Texas?

A. That's right.

Q. What was her occupation in Texas?

A. At the time I knew her she was a waitress, I believe.

Q. And when she came to Fairbanks, do you know whether she made any attempt to get a job at her usual occupation, waitress?

A. I'm not sure.

Q. And I believe you stated yesterday that immediately upon leaving, arriving at Fairbanks, why you left the others and went on your own?

A. That's right.

Q. Now, what day did you arrive in Fairbanks, to the best of your recollection?

(Testimony of Marilyn Jean Casey.)

A. Approximately June 29.

Q. Approximately June 29? A. Yes, sir.

Q. And when were you arrested? [70]

A. On June the 3rd, approximately 11:00 o'clock that night.

Q. July the 3rd? A. That's right.

Q. And where were you arrested?

A. At the Trail's End.

Q. And who were you arrested by?

A. By Mr. McRoberts, Frank Werth and three other people I don't know.

Q. Were any of them agents of the FBI?

A. They were not; no, sir.

Q. And did they have a Warrant?

A. They did not.

Q. And where were you at the time the arrest was made, in your apartment or cabin?

A. Yes.

Q. And what were you doing at the time of the arrest? A. I was getting up.

Q. In your home? A. Yes.

Q. And when was, when were you arraigned or after that arrest?

A. July the 7th, I believe it was, 7th or 8th.

Q. What?

A. July the 7th, I believe it was.

Q. And you were held in jail then from July the 3rd to July the 7th? [71] A. Yes, sir.

Q. Without being arraigned before Mrs. Nordale? A. Yes, sir.

Q. The United States Commissioner, and during

(Testimony of Marilyn Jean Casey.)

that time did you have conversations with the, with any of the Marshals or Deputy Marshals or members of the FBI? A. I did; yes, sir.

Q. And how often did you have those conversations?

A. Well, the day they were supposed to take me down to be arraigned before Mrs. Nordale, the Commissioner, they never did take me to the Commissioner's Office. They took me into Mr. Gore's office with Mr. Gore, Mr. Harkabus and Mr. Worsham there.

Q. And what did they do there?

A. They started telling me they wanted a story on the people.

Q. And did they suggest what story that should be? A. Did they suggest it?

Q. Yeah.

A. They told me that they knew they brought me up here for the purpose of prostitution even though it wasn't mentioned.

Q. Now, calling your attention to Government's Identification 30, statement that has been attributed to you on July the 6th, 1953. Now, apparently, I believe they stated—dictated by you. Did you, out of your own mind, put these [72] words down on paper or give them to anybody, "I, Marylian Jean Casey, make this free and voluntary statement to John Worsham and Edward Harkabus who have identified themselves to me as Special Agents for the Federal Bureau of Investigation"?

(Testimony of Marilyn Jean Casey.)

A. No, I did not. Those are their words. They put those down.

Q. Did you also put down the words, "No threats, promises of reward or otherwise have been made to me"? A. I did not.

Q. And who did? Who put those statements?

A. Mr. Harkabus.

Q. And after they told you that they knew these defendants had brought you up here for the purpose of prostitution, did they suggest the answers, does these answers suggested to you by Mr. Worsham or Mr. Harkabus or Mr. Gore or Mr. McRoberts? A. Quite a few of them, yes.

Q. And the story, conversations that they have put in here as to what was said by Mr. Williams, known as Steve, did you know a Mr. Williams, Steve Williams? A. Yes, I do.

Q. Now, you say that you stayed, you was held in jail from July the 3rd to July the 7th, is that right? A. That's right.

Q. And what is the date that this was signed, that is, the date of this instrument was July the 6th, was that the date? [73]

A. Yes, sir; that's the date they were supposed to take me to be arraigned before the Commissioner. I didn't get there.

Q. They didn't take you before the Commissioner? A. No, they didn't.

Q. What, if anything, did either Mr. Worsham or Mr. Harkabus say what would be done in case you would sign that paper?

(Testimony of Marilyn Jean Casey.)

A. They said I would not be prosecuted.

Q. And who typed this paper up?

A. I don't know for sure. I guess they did.

Q. Was it typed in your presence?

A. No, it was not.

Q. But during this three or four days that you were held in jail, did you have more than one talk with these men? A. Oh, yes.

Q. How many times were you taken before them? A. Approximately three or four.

Q. Did they at any time tell you about taking your, the films from your residence?

A. They didn't tell me until after they already had the camera and films.

Q. And they took the camera and then told you they had it? A. Yes, they did.

Q. Now, at the time that they entered your room and [74] took your camera, were any of the Identifications, from 1 to 30, or 1 to 29, I believe, had they ever been developed?

A. No, they hadn't. They were still in the rolls.

Q. Now, what time of the day was it that you signed this, Plaintiff's Identification 30, what time?

A. Well, whenever I went down to the office where they was. It was approximately, I would say, 11:30 in the morning, and they kept me up here until approximately 9:00 or 10:00 that night, and I believe I signed that the next morning, if I remember correctly.

Q. Did they have you in the office in the evening? A. Yes, they did.

(Testimony of Marilyn Jean Casey.)

Q. And how long were you in the office being interrogated, or told what your story was by Mr. Harkabus and Mr. Worsham?

A. From 11:00 o'clock that day until 9:30 that night.

Q. From 11:00 o'clock, and was that the time that they told you if you would sign this that they would turn you loose? A. It was.

Q. You ever remember going through a town named Orville, Washington?

A. No; the name doesn't sound familiar. I didn't pick that name.

Q. Who suggested that name to you?

A. Mr. Harkabus. [75]

Q. Marylian, did you, after arriving at Fairbanks, look for a job? A. Yes, I did.

Q. Where, what kind of work were you looking for?

A. Well, I wanted to either get work at a drive-in, found out there was no opening, so I settled for a waitress. I didn't want to taxi dance because it didn't pay enough.

Q. You thought about taxi dancing?

A. Yes, I did.

Q. Whereabouts? A. Squadron Club.

Q. Oh, you did go to work there?

A. Yes, I did.

Q. Since then have you done dancing, entertaining in and around Fairbanks at various clubs?

A. Yes, I have.

Q. What kind of work is that?

(Testimony of Marilyn Jean Casey.)

A. By profession I am a shake dancer.

Q. A what? A. Shake dancer.

Q. And do you remember a town named Three Forks, Montana? A. No, I don't.

Q. Who suggested that town to you?

A. I never heard of Three Forks, Montana, before.

Q. You remember Cheyenne? [76]

A. Yes, sir; I do.

Q. You remember being in Cheyenne?

A. I remember going through Cheyenne.

Q. And you remember going through a town called Casper, Wyoming?

A. No, sir; I don't, Mr. Taylor, because I didn't put any of those names in there. They looked on a map and picked the names.

Q. And the town of Cody? A. No, sir.

Q. Who suggested those names?

A. Mr. Harkabus put them in.

Q. Couer d'Alene, you remember a town named Couer d'Alene? A. No.

Q. Who suggested that name?

A. Mr. Harkabus did.

Q. Now, Miss Casey, at any time on that drive or prior to coming from Texas, did either Mrs. Bennett or Norma Crosby ever talk to you about going into a house of prostitution in Fairbanks?

A. No, sir; I don't hardly see how they could because it wasn't even in my mind whenever I got here.

Q. In fact, when you left there you had no idea?

(Testimony of Marilyn Jean Casey.)

A. I had no intentions whatsoever and I'm sure they didn't either.

Q. How long did you live in the, at the Trail's End Motel? [77]

A. Well, approximately whenever I first went to work at the Squadron Club, which was on July 9th. I lived at the club for approximately a week, a week and a half, and then I moved into the Trail's End where I lived for approximately a month or a month and a half.

Q. Now, you never swore that this is the truth, did you, Miss Casey?

A. That one there, I did not, no.

Q. And you are now under oath? A. I am.

Q. And is what you are saying now the truth?

A. It is, sir.

Q. And the reason that you signed this then was for the purpose of getting taken before the United States Commissioner so you could get bail, get out of the jail?

A. That's right, but I had both charges dropped after I signed the paper.

Q. And did they ever prosecute you on the charge which they arrested you on in the first place?

A. No, sir; they got dropped when I signed the paper.

Q. They kept their promise?

A. Yes, they did.

Q. So you got paid off after signing the paper, is that right? A. I guess that's right.

Q. So they kept their promise? [78]

(Testimony of Marilyn Jean Casey.)

A. Yes, they did.

Q. Now, Miss Casey, I will hand you Government's Identification No. 31 and it is purported to be a statement made before, an affidavit made before Mrs. Nordale. Now, is the date of that the date that you were before Mrs. Nordale? A. Yes, sir.

Q. What is that date?

A. The 8th day of July, 1953.

Q. And how did you happen to go before Mrs. Nordale and sign this affidavit?

A. The FBI told me that anything I swore to they could prosecute me for and then they didn't tell me until after I had already put my name on the piece of paper that I could be held for perjury.

Q. Did you prepare this paper?

A. I did not.

Q. Were you present when it was prepared?

A. No, I wasn't.

Q. And that was the day following, was that the day following the day that you signed this other paper, Identification 29, I believe that was, on the 6th, wasn't it? A. I believe so.

Q. This is the 8th, that would be two days later?

A. Yes, sir.

Q. Were you still in jail then the two days [79] later?

A. No. I had gotten out Monday afternoon, but they told me they wanted to see me again on the 8th.

Q. You went back on the 8th; what time of the day was it?

(Testimony of Marilyn Jean Casey.)

A. It was early in the morning, approximately 9:00 or 10:00 o'clock, I guess.

Q. And did you read this at the time that you signed it?

A. No, sir; I didn't read it. They read it to me, but they read it so fast I didn't know what was in it after they read it.

Q. So the wording in this is not your wording?

A. No, sir; none of that is my wording there.

Q. You didn't use the words then, "We travelled from Texas through the United States and subsequently crossed the Canadian border"?

A. No, sir; I did not.

Q. You did not then state, "Norma Jean Crosby drove the aforementioned girls across the Washington-Canadian border with full knowledge that instant girls were going to Alaska to work as prostitutes"? A. I said nothing like that.

Mr. Stevens: I beg your pardon. Would you read that last?

Mr. Taylor: "Norma Jean Crosby drove the aforementioned girls across the Washington-Canadian border with [80] full knowledge that instant girls were going to Alaska to work as prostitutes."

Q. (By Mr. Taylor): Do you know what the word "cognizant" means? A. No, I don't.

Q. So you didn't put the word down, the following words on this paper then, "Both Jack Bennett and Wesley Williams were cognizant that all of the girls were to work as prostitutes in Alaska"?

(Testimony of Marilyn Jean Casey.)

A. No, I did not.

Q. Whose wording is that?

A. Mr. Harkabus, I believe, fixed those papers.

Q. And did you sign that before you went before Mrs. Nordale, or did you sign it before Mrs. Nordale? A. Before Mrs. Nordale.

Q. And what inducement was given to you to sign this piece of paper?

A. Well, I was given that that piece of paper would not be to prosecute me, but yet they tried to with it.

Q. They tried to? A. They did.

Q. Now, Miss Casey, has any further threats or inducements been made to you to change your story as to what the FBI and the Marshal's office wanted?

A. Yes, sir; there has.

Q. And when has those threats or inducements been made? [81]

A. On April the 29th I heard that Mr. Thompson wanted to see me.

Q. And what was the inducement made for you to change your story?

A. Mr. Thompson told me if I would come up here and incriminate these people I could operate a bawdy house open here.

Q. And he then gave you the promise that if you would come up and implicate these defendants that you could run a bawdy house openly?

A. He certainly did.

Q. In any particular part of town?

A. He didn't say.

(Testimony of Marilyn Jean Casey.)

Q. Did you ever work at the Squadron Club?

A. Yes, sir; I did.

Q. So I take it then from your testimony, Miss Casey, at the time that you came to Fairbanks that you had no intentions of entering into prostitution?

A. No, sir; I did not.

Q. So then on the 28th day of June, 1953, then they could have been no concerted agreement between all of you that you was to enter a house of prostitution? A. Of course not.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens: [82]

Q. You were engaged to Mr. Kehert, Miss Casey? A. I was.

Q. How long were you engaged to Mr. Kehert?

A. Approximately three months before coming to Alaska.

Q. And you were to get married?

A. That's right.

Q. Were you engaged to Mr. Kehert in Texas?

A. I certainly **was**.

Q. And it was your idea to come to Alaska?

A. It **was**.

Q. And while you were engaged to Mr. Kehert you paid your own way to Alaska?

A. I certainly did.

Q. And while engaged to Mr. Kehert you stayed in the same cabins with him on the way up?

(Testimony of Marilyn Jean Casey.)

A. That is true.

Q. And you stayed actually in the same bed with him? A. Not all the time, no.

Q. Well, at least on one occasion in Denver you testified, did you not? A. Yes, that's right.

Q. And did you participate in any acts of sexual intercourse with Mr. Kehert?

Mr. Taylor: We object, your Honor, incompetent, irrelevant and immaterial, has no bearing upon the prosecution for transportation or [83] conspiracy.

The Court: Objection overruled. Answer the question.

A. At that time, no.

Q. (By Mr. Stevens): And Miss Casey, when you were brought into jail you were in jail on a vagrancy charge?

A. That's right, and operating a bawdy house.

Q. And what date was that?

A. It was on July the 3rd, approximately 11:00 o'clock at night. It was on a Thursday.

Q. Was the complaint read to you at any time by Mrs. Nordale?

A. It was read whenever the charges were dropped in her court.

Q. And then you talked to the FBI on the 6th, is that right, the 6th day of July, 1953. That is the date the statement is signed, is that correct?

A. Yes, it is.

Q. And after you signed the statement you were released from jail? A. I was.

(Testimony of Marilyn Jean Casey.)

Q. And two days later you came back to sign the statement before Mrs. Nordale?

A. That's correct.

Q. Did someone drag you back before Mrs. Nordale?

A. They did not. I didn't say they did. [84]

Q. And you come back voluntarily?

A. I came back, yes.

Q. And you swore that the statement you signed was true? A. Yes, I did.

Q. It was an affidavit, was it not? It was not prepared as your statement. It was prepared as an affidavit of facts for you to sign?

A. I don't know what you call it, but I know that isn't my wording in there.

Q. But you did sign it? A. I did.

Q. And Mrs. Nordale asked you whether or not it was true? A. That's correct.

Q. And that was after you were released from jail? A. That's right.

Q. And did you know that by signing that affidavit the person to whom you were engaged would be thrown in jail? A. Did I know that?

Q. Yes.

A. I thought it would only be him.

Q. But you did know that?

A. Certainly. I wanted him in jail because I was mad at him at the present time.

Q. Now, after you got out of jail you went back to the same place, did you not? [85]

A. Meaning, the same place?

(Testimony of Marilyn Jean Casey.)

Q. To the Trail's End? A. I did not.

Q. I thought you just said that you went to the Squadron Club and then went back to the same place?

A. No; I said nothing of the kind. I said I stayed at the Squadron Club for a week and a half and moved back to the Trail's End.

Q. After you got out of jail you went back to the same place and lived? A. I did, yes.

Q. You got to Alaska on the 30th day of June?

A. 29th or 30th, I don't remember which.

Q. And it was some time between the 3rd and the 6th of July that you were picked up for operating a bawdy house? A. It was on the 3rd.

Q. Three days later? A. That's right.

Q. And you came all the way from Texas to Alaska with a man to whom you were engaged?

A. That's correct.

Q. And you did not practice any acts of sexual intercourse with him on the way?

A. I didn't say that.

Q. I asked you specifically, Miss Casey, whether or not you did? [86]

A. I said not at that time, no.

Q. Did you? A. Yes.

Q. Where? A. In British Columbia.

Q. Do you remember where you were staying?

A. No, I don't.

Q. And then within three days after you got to Fairbanks you turned out as a prostitute, is that correct? A. That's right.

(Testimony of Marilyn Jean Casey.)

Q. It was almost immediately, was it not? You were picked up in three days. Were you picked up the first night you were out, Miss Casey?

A. The second night.

Q. Now, did you tell the FBI where that camera was?

A. I did not.

Q. Did you tell them what were on the rolls of film?

A. When they asked me I told them some pictures were taken on the way.

Q. You did not tell them ahead of time?

A. No, I did not.

Q. Does it seem strange to you, Miss Casey, that the FBI would bring in a camera with undeveloped film on it?

A. It does not, if they didn't know what was on the film.

Q. If they knew what was on it? [87]

A. I say if they didn't know.

Q. By profession you are a shake dancer?

A. That's right.

Q. Did you follow that profession in Texas?

A. I danced in Texas, yes.

Q. Where did you dance?

A. Club Showtime.

Q. Did you follow your new calling in Texas at all, Miss Casey, as a prostitute?

A. I did not.

Q. Now, you say that Mr. Thompson told you that you could run a bawdy house opening in this town?

A. He most certainly did.

Q. And that was when?

(Testimony of Marilyn Jean Casey.)

A. That was on April the 29th.

Q. Of this year? A. That's correct.

Q. That has been about two weeks ago?

A. That's right.

Q. And Miss Casey, you have been involved in several criminal cases here, have you not, in Fairbanks? A. No, I haven't.

Mr. Taylor: Just a moment, Miss Casey. We are going to object to the question, incompetent, irrelevant and immaterial and improper.

The Court: How would that be material? [88]

Mr. Stevens: Well, it was leading up to another question. If your Honor wishes the same objection, I will ask the other question anyway.

The Court: Very well.

Mr. Stevens: Withdraw that question.

Q. (By Mr. Stevens): Miss Casey, is not Mr. Taylor your attorney here in Fairbanks?

A. Is Mr. Taylor my attorney?

Q. Yes. A. That's correct.

Q. Did you talk to Mr. Taylor about what you should say on the stand today?

A. I have not.

Q. Have you ever been to Mr. Taylor's office to discuss this case? A. Not this case, no.

Q. Now, Mr. Taylor asked you yesterday about these pictures and specifically asked you whether or not they could have been taken any place, is that right? A. That's right.

(Testimony of Marilyn Jean Casey.)

Q. And you said you believed they could have been taken any place?

A. Yes, they could have.

Q. Did you testify yesterday that you bought the camera in Washington? [89]

A. I didn't say anything about Washington. I said a small town.

Q. I believe I asked you specifically was that in Washington? I will ask you again.

A. No, it wasn't in Washington.

Q. Was it on the trip from Texas to Alaska?

A. It was.

Q. The trip you made with these defendants?

A. That's right.

Q. So that by your statement that these could have been taken anywhere it could have been anywhere between Texas and Alaska?

A. That's right.

Q. And that was last year, 1953?

A. That's right.

Q. Now, did you not go over these films with Mr. Harkabus after they were developed?

A. I told him who they were.

Q. You also told him where they were taken, did you not? A. Well, it is on there.

Q. I asked you, did you tell him where they were taken? A. I did not.

Q. Did you go over them roll by roll?

A. That's right.

Q. There were four or five rolls? [90]

A. Yes, but some of them aren't there.

(Testimony of Marilyn Jean Casey.)

Q. Yes; there are two that are not there. Would you like to have those put in, too, Miss Casey?

A. I don't care.

Q. Now, you say that Mr. Harkabus suggested to you the answers for this statement, this long statement on the 6th of July?

A. Some of them, yes, I said.

Q. Did he suggest to you where you had stayed in Denver?

A. No; I told him where I had stayed.

Q. If he had been able to suggest to you, he would have told you the right place, would he not?

A. What I said was that I picked out no names of any town that are on there, with the exception of Denver, Cheyenne.

Q. In regard to Denver, did you tell him where you stayed in Denver?

A. I did.

Q. And that was to the best of your memory?

A. That's right.

Q. And did Mr. Harkabus tell you any of the places where you stayed?

A. He picked out the towns.

Q. Did he tell you the places in the towns?

A. No, because that is the only specific place I named, I believe is at Denver. [91]

Q. Did Mr. Harkabus tell you that you stopped at the Western Union to pick up a money order?

A. I told him that also.

Q. And did he tell you that you didn't recall the exact route but traveled through Cheyenne, Wyoming?

A. He picked out the route.

(Testimony of Marilyn Jean Casey.)

Q. And did he tell you where Mr. Bennett and his party stayed the night that you stayed in Denver with Mr. Kehert? A. No, he did not.

Q. Did you remember where they stayed?

A. After he got a telephone book.

Q. Afterwards then, did you tell him where you stayed? A. I did.

Q. And did he check that in the telephone book, too? A. He did.

Q. Then he didn't tell you where you stayed?

A. No.

Q. You told him? A. That's right.

Q. And if the evidence should show that that is not the right place, are you certain that that is where you stayed? A. I am.

Q. And you stayed with Mr. Kehert?

A. That's right. [92]

Q. And you were driving a Buick with an Indiana license plate? A. That's right.

Q. Did Mr. Bennett, pardon me, Mr. Harkabus suggest to you who drove across the two lines?

A. He did not.

Q. Did you believe it made a difference who drove across those two lines? A. I did not.

Q. Who drove across the various state lines?

A. I don't remember.

Q. Who drove across the line between Texas and what is it, Arkansas, or did you come up through New Mexico? A. New Mexico.

Q. Who drove across that line?

A. I was driving.

(Testimony of Marilyn Jean Casey.)

Q. Who drove across the line between New Mexico and Colorado?

A. I don't know. I don't remember.

Q. And from Colorado to Wyoming?

A. I still don't remember.

Q. But you are certain that four women drove across in the car across the two international borders?

A. Of course.

Q. Is that how you got the addresses that appear in this statement, Mr. Harkabus got them from a phone book? [93]

A. That's correct.

Q. And was that after you told him where you stayed?

A. No; I hadn't told him at the present time where I had stayed. He got the telephone book and let me look at the motels. He went down to the ACS and got a telephone book of Denver.

Q. Did you know that the case against you is still pending in the Commissioner's Court?

A. What case?

Q. The case in which you were arrested in June of last year, did you know that?

A. It was supposed to have been dropped.

Q. Who told you it was dropped?

A. Mr. Gore.

Q. Did Mr. McRoberts talk to you about this case before you signed the affidavit?

A. I don't remember. I'm not sure. He could have.

Q. Haven't you previously testified that Mr. Mc-

(Testimony of Marilyn Jean Casey.)

Roberts told you to tell the story and Mr. Harkabus told you to tell the story and Mr. Gore told you to tell the story?

A. I said it was told in their story.

Q. That was in Mr. Gore's office?

A. That was in the FBI office when the story was told.

Q. I thought you just testified this morning you were up in my office?

A. I did not. I said Mr. Gore's office. [94]

Q. I am asking you now where you were told to tell this story?

A. Up in Mr. Gore's office, as I said before.

Q. And who was there?

A. Mr. Gore, Mr. Harkabus, Mr. Worsham, and Mr. McRoberts took me in.

Q. And with all those people present they all urged you to tell a story that was not true?

A. They gave me the general idea of the story they wanted and I wanted out of jail. I mean, I didn't think it would start all this.

Q. Well, after you got out of jail and you were released for two days, were not all of your friends in jail by the time you signed the second statement?

A. They were.

Q. You knew what it was causing then, did you not?

A. Well, I thought I could straighten it out later, because (interrupted)——

Q. You would straighten it out by signing an affidavit of facts, Miss Casey?

(Testimony of Marilyn Jean Casey.)

A. That's right.

Q. Did someone threaten to put you back in jail if you didn't sign the second statement?

A. No; but how did I know you wouldn't?

Q. Mr. Thompson arrested you for being a vagrant just recently, did he not? [95]

A. He did not.

Q. Didn't he pick you up here awhile back?

A. He most certainly did not.

Q. You had some trouble with him, did you not, Miss Casey? A. I did not.

Q. None at all? Over a year?

A. That's right.

Q. Is there any reason why you would dislike Mr. Thompson? A. Several reasons, yes.

Q. What reason?

A. I dislike the whole office up here as far as that goes.

Q. What reason is that?

A. Because of the way a lot of things are handled.

Q. Is there any reason you would make this statement against Mr. Thompson?

A. There is no reason.

Q. You say then that it is the truth, is that right? A. It most certainly is the truth.

Q. Did you call Mr. Thompson at 2:00 o'clock here just about a week ago, within the last week?

A. Not within the last week, no.

Q. Did you talk to him at 2:00 o'clock in the morning recently, you made a call to him? [96]

(Testimony of Marilyn Jean Casey.)

A. On June, April the 29th.

Q. Oh, April 29th you called him at 2:00 in the morning?

A. That's right. The news on the south end was that he wanted to see me, so I called him.

Q. You knew he wanted to see you so you woke him up at 2:00 in the morning, is that right?

A. That's right.

Q. What was the conversation? Did you not tell him then that you changed your mind then and were going to tell the truth for a change?

A. No.

Q. Now, the inducement in your mind then to sign this statement, the first statement, was to get out of jail? A. That's right.

Q. What was the inducement to sign the second one? A. Afraid of going back to jail.

Q. And between the time you signed that statement and the time you appeared in any hearing in this case, did you see any of the defendants?

A. I did not.

Q. You never saw a one of them? A. No.

Q. Yet you were engaged to Wesley Kehert?

A. That's right.

Q. And you say that Mr. Kehert dropped you because you had been picked up? [97]

A. That's right.

Q. Had he not also been picked up?

A. He had, but it was, I was the one that had him picked up.

(Testimony of Marilyn Jean Casey.)

Q. Had not all the rest of the people been picked up? A. That's right.

Q. And how about Mrs. Bennett and Miss Crosby, were they not also picked up with you originally? A. With me, they were not.

Q. Very soon thereafter?

A. I don't know. I didn't pick them up.

Q. You don't know of your own knowledge?

A. No, I do not.

Q. You weren't downstairs with them?

A. Downstairs?

Q. In the jail?

A. No, because I was upstairs and they was booking me whenever they brought Miss Crosby up.

Q. But you weren't lodged in the jail at the same time downstairs? A. No, I don't believe so.

Q. What other inducement did you have to make these statements, Miss Casey?

A. Those statements, get out of jail, that's all.

Q. That's all. Did anyone tell you it was a felony to do the things that you stated were [98] done?

A. Yeah, they told me after I signed them.

Q. After you signed them? A. Yes.

Q. And before you signed the statement when you talked to Mr. Gore and all the people upstairs here in this office, the District Attorney's office, you had no idea what the inquiry was about?

A. Of course I had an idea. I had an idea what it was about.

(Testimony of Marilyn Jean Casey.)

Q. You knew then at least some of those people would get in trouble?

A. No, because I thought I could straighten it out later.

Q. Do you remember how much your bond was that was keeping you in jail? A. Yes, I do.

Q. How much was it?

A. Ten thousand five hundred.

Q. Ten thousand five hundred?

A. That's right.

Q. On a vagrancy charge?

A. That's what it was.

Q. Is that as true as all the rest of your statements here? A. Now I'm telling the truth.

Q. How long did you work at the Squadron Club, Miss Casey? [99]

A. Approximately a month and a half, and then I went to work at the Stag Club.

Q. And you haven't participated in acts of prostitution since those first two nights you were in Fairbanks? A. Yes, I have.

Q. I thought you just told me that you only worked two nights?

A. You said then. You asked me how many nights I worked before I was picked up.

Q. All right then, I ask you how long did you work as a prostitute?

A. From the 29th of June up to the 10th, whenever the trial started, whenever Mr. Thompson told me I could.

(Testimony of Marilyn Jean Casey.)

Q. Whenever Mr. Thompson told you you could start? A. That's right.

Q. You seek out advice from Mr. Thompson before you practiced prostitution?

A. No, I just wanted to make sure I wasn't picked up.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: Could we take a recess now, your Honor?

The Court: Yes, ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 10:45 a.m., the court took a recess until 11:02 a.m., at which time it reconvened and the trial of this cause was [100] resumed.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

MARYLIAN JEAN CASEY

the witness on the stand at the time the recess was taken resumed the stand for

Recross-Examination

By Mr. Taylor:

Q. Miss Casey, I believe in response to an answer upon cross-examination by myself you said that the FBI men had talked with you every day three or four times from the time you were arrested until the time you signed this first statement?

(Testimony of Marilyn Jean Casey.)

A. Yes. That is on the same day.

Q. Were all of those conversations had at the same place? A. No, they weren't.

Q. Where did they talk to you besides in Mr. Gore's office? A. In the FBI office.

Q. And so then after you signed Plaintiff's Identification 31, which is an affidavit made before Mrs. Nordale you came back to sign that, did you?

A. Yes, I did.

Q. And was that at their orders? [101]

A. They asked me, yes.

Q. And was that also if you signed that there would be no prosecution?

A. There wasn't supposed to be.

Q. Now, was this statement by Mr. Stevens this morning the first time you knew that the vagrancy charge was still hanging over you?

A. It is. That was supposed to have been dropped.

Q. They told you that?

A. They did, yes, sir.

Q. The boys don't keep their promise then?

A. Well, no. It seems like they want to send someone not particular who.

Q. Who told you that the bond that you were being held on was a ten thousand five hundred dollar bond? A. Who told me that?

Q. Yes. A. That's what they were all at.

Q. And was that the bond that was set for you on the charge of vagrancy?

(Testimony of Marilyn Jean Casey.)

A. As far as I know, yes, sir. It was supposed to have been five hundred at first and whenever a friend of mine came up to make the bond at five hundred they put it up to ten thousand five hundred.

Q. And you were not able to get the bail then?

A. No, sir, I was not. [102]

Q. Were you advised that you could have an attorney? A. No, sir.

Q. Were you advised that anything you said could be used against you at this trial?

A. No, sir.

Mr. Stevens: Pardon me, would you read that? Was that at this trial?

Mr. Taylor: I didn't get your remark.

Mr. Stevens: I didn't make any remark. I just asked if your question was, could the evidence be used at this trial?

Mr. Taylor: Well, could it?

Mr. Stevens: You are asking the questions, Mr. Taylor.

Q. (By Mr. Taylor): Now, Miss Casey, do you know when you crossed the line from Texas into New Mexico? A. No, sir.

Q. Or from New Mexico into Colorado?

A. No, sir.

Q. Colorado into Wyoming? A. No, sir.

Q. Wyoming into Montana? A. No, sir.

Q. Isn't it a fact they have no customs office at the borders between the states? [103]

(Testimony of Marilyn Jean Casey.)

A. That's right.

Q. So the only customs office that you passed through would be the one at the Washington-Canadian border and the Canadian-Alaska border?

A. That's right.

Q. That would be the only place that you would know you would be passing into from the United States into a foreign country and from a foreign country back into the United States?

A. That's right.

Q. So you didn't know at any time when you crossed any of the state lines? A. No, sir.

Q. Now, at the time that the FBI released you from custody after you signed these papers you stated that they were going to drop the case?

A. They did, yes.

Q. And when you were released you didn't have to put up any bail?

A. No, sir, none whatsoever.

Q. And you have been going along this far without any prosecution of that case?

A. That's right.

Q. Now, this telephone call you made to Mr. Thompson, what did you say the date was; was that recently?

A. Yes, sir, only April the 29th, approximately two o'clock in the morning. [104]

Q. And where did you catch him on the phone?

A. From the Territorial Police office.

Q. You called from there?

A. Yes, sir, I did.

(Testimony of Marilyn Jean Casey.)

Q. And where did you call him?

A. At his home where they told me I could reach him.

Q. Do you mean to tell this jury that Mr. Thompson was at home at two o'clock in the morning?

A. Yes, he was.

Q. Isn't he customarily out at South Fairbanks?

A. Yes, sir. He said he was getting rested up for the payday.

Q. Isn't that kind of unusual to find Mr. Thompson at home in bed at two in the morning?

A. Very unusual, yes.

Q. Now, did, anytime after this indictment was returned, Miss Casey, have you ever had any other officers call upon you at your own home?

A. Before I went to the indictment Mr. Harkabus and the young kid in the office, I don't know his name, a Mr. Thompson came by where I was staying.

Q. And did they talk to you then?

A. Yes, they did.

Q. And they tried to induce you to change your story?

A. Yes, they told me I had better change my story.

Q. Threatened you then? [105]

A. Well, more or less, yes.

Q. Got that attitude you will change your story or else, along that line? A. Yes.

Q. Did Mr. Stevens and Mr. McRoberts and Mr. Thompson ever come out there and talk to you,

(Testimony of Marilyn Jean Casey.)

South Fairbanks? A. No.

Q. What?

A. No. I have seen them out there in the bars.

Q. Now, at the time you slept with Mr. Kehert, did he pay you for sleeping with you?

A. He did not.

Q. And at the time that you did you were engaged to Mr. Kehert? A. Not all the time, no.

Q. I mean the time that you slept with him?

A. One time, yes, sir.

Q. When was it you became sore at Kehert and had nothing more to do with him?

A. About two days before we got here.

Q. Then do you know how long Mr. Kehert stayed around Fairbanks after you got here?

A. I have no idea.

Q. He didn't come around to see you then after the first few days then?

A. No, he sure didn't. [106]

Q. Now, at the time when you got here, the first three days that you were in Fairbanks after your arrival, did you have money and means of supporting yourself?

A. I had a little money whenever I got here.

Q. And you had money to pay the rent on your own apartment or room?

A. You mean at the Trail's End?

Q. Yes.

A. Well, he paid it for the first couple of nights for me, told me he would get me started.

Q. And then how, then after that did you pay

(Testimony of Marilyn Jean Casey.)

your own room rent? A. Yes, I did.

Q. So then the only—it only took you three days then to become a vagrant according to the Marshals' viewpoint, three days after you got here you was arrested for vagrancy? A. Yes.

Mr. Taylor: That's all, Miss Casey.

Redirect Examination

By Mr. Stevens:

Q. Miss Casey, you were arrested on the 3rd of July? A. That's right.

Q. When was the first time you saw any of these officers who questioned you about this matter?

A. Which officers, the one that picked me up or the ones that questioned me? [107]

Q. The ones that questioned you?

A. The first day I walked in the office.

Q. No, no, you were downstairs on the 3rd of July. Did you talk to the FBI before you were arrested? A. No, sir, I did not.

Q. Then your statement is that you talked to them on the 3rd of July?

A. I did not say that. I don't mean the office upstairs. I mean Mr. Gore's office and the FBI office.

Q. What I am after is when was the first time you discussed this matter with any of the officers here in Fairbanks?

A. Well, the matter was brought up when they booked me on the 3rd.

Q. You were booked on a Friday night, were you not?

(Testimony of Marilyn Jean Casey.)

A. Thursday night, because the 3rd of July if you look at the calendar was a Friday and the 3rd was on a Thursday night.

Q. Would you like to look at a calendar?

A. I would, yes.

Mr. Stevens: Would you have any objection if I show the witness the calendar for 1953, Mr. Taylor?

Mr. Taylor: She is your witness. I didn't bring her here.

A. My mistake. [108]

Q. Now, the 3rd of July was on a Friday night in 1953, was it not? A. That's right, yes.

Q. And you were brought in on that night?

A. That's right.

Q. And I guess we can all know that the 4th of July is a national holiday? A. That's right.

Q. And the next day was Sunday?

A. That's right.

Q. And you were arraigned the next morning, were you not?

A. Sure, ten thousand five hundred.

Q. When did you talk to the FBI about this case? A. Before I was ever arraigned.

Q. When was it, Friday night?

A. It was not.

Q. Was it on the 4th of July?

A. No, it wasn't

Q. Was it on Sunday after the 4th of July?

A. No, it wasn't.

Q. Was it on Monday morning then?

A. It was.

(Testimony of Marilyn Jean Casey.)

Q. And during that time, from the 3rd until the morning of the 6th were you not with Miss Crosby, the defendant in this case, downstairs? [109]

A. Well, it wasn't my idea. You had us in the same cell together.

Q. But you knew she was down there?

A. Of course I knew it.

Q. And you knew that telling this statement would get the others in trouble also?

A. Well, I wanted Kehert.

Q. You wanted Kehert; why did you tell everything that implicates Mr. Bennett?

A. Why? That's the only way I could get him.

Q. And your statement is that you only changed cars and rode with the four women at the borders of the Canadian-Alaskan border and the Canadian-American border; is that right?

A. No, I rode with the women a lot. That's the time we were all in the car.

Q. The four of you riding together and the two men riding alone? A. That's right.

Q. At those two particular times?

A. That's right, yes.

Q. Those are the two places where you know they would make records, were they not, Miss Casey?

A. I didn't know they made records. I had never been up here before.

Q. If you didn't, who did know? [110]

A. I don't know.

Q. Did you know whether Mr. Bennett had ever

(Testimony of Marilyn Jean Casey.)

been to Alaska before? A. I don't know.

Q. You knew Mr. Kehert had been to Alaska?

A. Yes.

Mr. Stevens: Your witness, Mr. Taylor.

Recross Examination

By Mr. Taylor:

Q. Were there other times when you girls all rode in the same car? A. Lots of times, yes.

Q. The time you came up you knew nothing about the formalities then of crossing from United States into Canada?

A. I did not, because it was never mentioned, Mr. Taylor.

Mr. Taylor: That's all.

Mr. Stevens: That's all, Miss Casey. Your Honor, I ask that Miss Casey be told she is still a witness in this case and to make herself available over the term of this trial.

The Court: Any objections, Mr. Taylor?

Mr. Taylor: No, your Honor.

The Court: Very well then, Miss Casey.

Mr. Stevens: We do wish her to attend.

Mr. Taylor: I assume Miss Casey is under subpoena. [111] Unless by permission of the court, she can't depart the court.

The Court: All right. You will remain around here so we can call you if we want you.

Miss Casey: You want me to wait outside?

(Witness excused.)

Mr. Stevens: Call Mr. Denike, please.

HENRY W. DENIKE

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Will you, please, state your name to the court and the jury, please. A. Henry W. Denike.

Q. Mr. Denike, where do you live?

A. Denver, Colorado.

Q. What is your occupation, Mr. Denike?

A. Superintendent, Western Union Telegraph Company.

Q. And were you in that occupation June of 1953? A. I was.

Q. How long have you been employed by Western Union, Mr. Denike? A. Over fifty years.

Q. I wonder if you could state to the court and the jury what your official duties are?

A. I have charge of all operations of the Western Union Telegraph Company at Denver, Colorado. [112]

Q. Now, sir, in your capacity as Superintendent of Western Union office in Denver, are you required to supervise the business records?

A. Yes, I am responsible and supervise the handling of all the records and maintaining them and so forth.

Q. I wonder if you can state whether or not the law requires you to keep such records?

(Testimony of Henry W. Denike.)

A. The Federal Communications Commission orders are that we maintain such records three years on such records as I have. There is different times on different kind of records, but certain records it is three years.

Q. I would like to ask you at this time whether or not you have checked your records previous to coming to Fairbanks? A. I did.

Q. Now, I wonder if you would state whether or not you have any records involving a Wesley Kehert under your supervision? A. I have.

Q. Do you have those records with you?

A. Yes, sir.

Mr. Yeager: May I see them, sir? Mr. Clerk, I wonder if these may be marked for identification?

The Clerk: Government's Identification [113] No. 32.

(Three (3) Western Union records, namely, Money Order order, telegram and Money Order, were marked Government's Identification No. 32.)

Q. (By Mr. Yeager): Now, Mr. Denike, I hand you Government's Identification 32 and I wish you would identify that, please? A. I do.

Q. Could you identify those?

A. Yes. The records.

Q. Yes. A. Yes, I can.

Q. What are they?

A. The first blank on here is what we call a

(Testimony of Henry W. Denike.)

money order application blank. It is a form that is prepared covering the name of the payee of the money order, the address and the destination, different place, and the name of the sender of the money order and the amount is also shown on here.

Q. Is there anything else there, Mr. Denike?

A. There is an identification clause on this original application. It is signed by Oliver M. Kehert and the request was made that we ask the payee a certain question and if the payee could answer that question it would be the identification necessary.

Q. Now, I wonder if you could identify any of the others there, Mr. Denike? [114]

A. The second on here is the telegram as received at Denver, Colorado, addressed marked MOD which means Money Order Department.

Q. That's fine, Mr. Denike. At this time I wonder if you would identify the third?

A. The third is a draft that is prepared by us on one of our standard money order payments. Such a draft is prepared on all money orders paid and it shows the name of the payee and the amount and where it is from and the date on there, and it is endorsed and we give the money to the payee.

Q. Now, Mr. Denike, I wonder if you would state whether or not these records were kept in the regular course of business of Western Union?

A. We keep all these records as stated for three years under the FCC regulations.

Q. What is the, is this the original record kept under your supervision?

(Testimony of Henry W. Denike.)

A. The application on top is filed at Louisville, Kentucky, where the money originated and that was sent. I called for that, to have it sent to me. This message is our original message in our files that we keep here at all times. The Money Order draft after it is cashed it is held for a few days and then it is sent to our auditor of money order payments, and receipts, and they match the application. They match the money order draft against the application to see that the correct payment is made, the amount, etc. [115]

Q. Now, Mr. Denike, was it or was it not the regular course of business to keep such records for the Western Union?

A. I don't understand the question.

Q. You keep these in the regular course of your business at Western Union; is that correct?

A. Yes, we do. As I say, we have to keep them under government regulations.

Mr. Yeager: Your Honor, I would like to offer those documents into evidence pursuant to Title 28, Section 1732 of the United States Code.

Mr. Taylor: We object, your Honor, upon the ground incompetent, irrelevant and immaterial; proper foundation has not been laid, and they do not go to tend to prove any of the issues in this Complaint. Also object, your Honor, upon the grounds that one part of that exhibit is prepared at Louisville. I believe it was Louisville, Kentucky, and this witness would have no such knowledge to say that it is what it purports to be on its face.

(Testimony of Henry W. Denike.)

The Court: What is the relevancy of this to this case?

Mr. Yeager: Your Honor, this is a record of a transaction that took place in Western Union, between the Western Union office at Denver and the defendant, Mr. Kehert, and shows the transaction took place in Denver, Colorado, and the fact that Mr. Kehert received money, your Honor, at [116] that time, which is relevant to our question of transportation. I think it is very relevant, your Honor, and it should be admissible under the business records act.

Mr. Taylor: Your Honor, I can't see where it can be relevant, getting \$992.00 from his father as to his transportation charge or a conspiracy charge.

Mr. Yeager: I believe, your Honor, also that Marilyn Jean Casey testified that Mr. Kehert while he was in Denver entered into the Western Union office there and she believed he was short of money at that time. Therefore, your Honor, these records are very relevant to the case and should be admissible.

The Court: Well, I will permit the admission of it.

The Clerk: Government's Exhibit "A."

(Government's Identification No. 32 was received in evidence as Government's Exhibit "A.")

Q. (By Mr. Yeager): Mr. Denike, I hand you Government's Exhibit "A." I wonder if you would

(Testimony of Henry W. Denike.)

explain those fully to the court and the jury?

A. Well, each blank? You want each blank explained again?

Q. Yes, if you please.

A. The blank on top here is an application for sending a money order. It was filed in our office at Louisville, Kentucky, on June the 22nd, 1953, with our automatic date stamp [117] on it of 8:52 a.m. The application shows the money is to be paid to Wesley E. Kehert, Ranch House Hotel, Denver, Colorado. The signature on it is Oliver M. Kehert, 421 Knoblock, with a telephone 36877 and on the bottom line it says "Information for test question" and the information there shows "Mother's name Rena Elsie." The amount of this money order as shown was \$992.86, charges for handling making a total of one thousand dollars that was paid to our office at Louisville according to the records.

Q. Would you continue, if you please, with the rest of the Government's Exhibit?

A. The next message is a telegram original received by us in Denver, Colorado, dated Louisville, Kentucky, 8:52 a.m., June 22, 1953. It is addressed to MOD which is an abbreviation for Money Order Department of Denver. The first word is "Quell." It is a code word for the amount of money, together with eighty-six cents to be paid to Wesley E. Kehert with the test question Mother's name, Rena Elsie, and her address, Rena Elsie and her address Ranch House, Denver, and from Oliver M. Kehert. When

(Testimony of Henry W. Denike.)

this is received we prepared a money order draft and we show the identification on the blank, the time the money order was paid, etc., and this is what the message shows, Buick automobile, Serial 16979411, Engine Number V1500455. I am not quite certain about one number because it is not very clear. There is another notation on here. It says, "Answered the question O.K.", which refers to [118] the test question about the name of the payee's mother. It also shows the draft number and the amount that was taken.

Q. Are those markings on there, Mr. Denike, made in the regular course of business?

A. Regular course of business as a clerk in the office would pay the money order. It is on every money order we make, something similar to that. Whatever they produce. The money order draft is one of our standard drafts that is prepared for each money order payment. It shows issued at Denver, Colorado, on June 22, 1953, payable to Wesley E. Kehert, \$992.86, telegram Louisville, Kentucky, on June 22, 1953. On the back it is endorsed Wesley E. Kehert with the Western Union employee's signature symbol that is used by various clerks as the paying clerk.

Mr. Yeager: Thank you, Mr. Denike. You may take the witness, Mr. Taylor.

(Testimony of Henry W. Denike.)

Cross-Examination

By Mr. Taylor:

Q. What did you say your name was?

A. Henry W. Denike.

Q. D-e-n-i-k-e? A. Yes.

Q. Do you recognize Mr. Kehert in this courtroom?

A. No, I know nothing about the case. I don't know Mr. Kehert.

Q. You don't know then whether any of these defendants [119] are the parties named in that draft then? A. Not personally, no.

Q. Now, on this first sheet here, where did you get that, Mr. Denike?

A. Got it from our auditor of money order receipts and revenues.

Q. What is your auditor's name?

A. Matson.

Q. No, just from your memory?

A. Matson.

Q. And he signed this in any place?

A. I don't remember his signature on there anywhere.

Q. And you got this, the top sheet then considerably, a considerable time after the transaction was completed in Denver, was it not? A. Yes.

Q. And where was this transaction, where did this transaction take place in Denver?

A. It was paid at our main office, 917-17th Street.

(Testimony of Henry W. Denike.)

Q. Isn't it a fact you have quite a number of Western Union offices in Denver? A. Yes.

Q. Where is your main office?

A. 917-17th Street.

Q. Where is the Ranch House Hotel?

A. I will guess it is on South Santa Fe Avenue, on [120] the road to Colorado Springs, on the old road to Colorado Springs.

Q. Do you know a Westward Ho Motel in Denver? A. No, I don't recognize that.

Q. You didn't have any communications with Mr. Kehert at the Ranch House Hotel?

A. No.

Q. Do people sometimes in transmitting money will give a hotel as an address you can get in touch with them?

A. I don't know how the sender got the address of the Ranch House Hotel on there.

Q. And then you at your office after Mr. Kehert had answered the code question properly made out this draft for \$992.86; is that right?

A. Prepared the draft. He endorsed it and gave him the cash.

Q. And you give him the cash for it?

A. Our office give him the cash for it.

Q. Do you know who was with Mr. Kehert at the time that this transaction took place?

A. No, sir.

Q. And you don't know whether Mr. Kehert is in the courtroom at this time?

A. No, sir, I don't know who Mr. Kehert is.

(Testimony of Henry W. Denike.)

Q. But you do know that Mr. Kehert on that day had \$992.86? [121]

A. Our records show we paid him and he produced the proper identification for the money.

Mr. Taylor: That's all.

Mr. Yeager: That's all, Mr. Denike. Thank you.

Mr. Stevens: Thank you very much, Mr. Denike.

Your Honor, may we have permission of the court to release Mr. Denike to return to his home?

The Court: Yes.

(Witness excused.)

RITA A. ELLERMEIER

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Would you state your name to the court and jury, please? A. Mrs. Rita Ellermeier.

Mr. Taylor: Just a moment, your Honor. I am going to object to the questioning of this witness upon the grounds that she has been in the courtroom while the trial has been in progress. I have been informed that she has listened to the testimony.

The Witness: Only while you were questioning the jury.

Mr. Taylor: Have you not been in here, come in here several times during, while the trial has been in progress? [122]

(Testimony of Rita A. Ellermeier.)

The Witness: No, I was just here yesterday morning.

Mr. Taylor: I withdraw my objection. Would you please state your name again, please?

The Witness: Mrs. Rita Ellermeier.

Q. (By Mr. Yeager): Where do you live, Mrs. Ellermeier? A. In Denver, Colorado.

Q. And what do you do in Denver?

A. I manage the Ranch House Motor Hotel.

Q. How long have you managed the Ranch House? A. Year and two months.

Q. Now, I wonder if you could state whether or not to the court in managing your Ranch House Motel whether you keep registration records?

A. Yes, we do, for a period of five years.

Q. I wonder if you could state whether or not you are required to keep such cards?

A. Yes, we are to my knowledge.

Q. And do you have custody and supervision of these records, Mrs. Ellermeier?

A. Yes, we do.

Q. Now, Mrs. Ellermeier, will you state whether or not you have made a search of your records before coming to Fairbanks, Alaska?

A. Yes, I did. [123]

Q. And will you state whether or not you found a registration card with the name of Mr. and Mrs. Kehert thereon? A. Yes.

Q. Do you have the card with you?

A. Yes, I do.

Mr. Yeager: May I have it, please. Clerk, may I have this marked for identification?

(Testimony of Rita A. Ellermeier.)

The Clerk: Government's Identification No. 33.

(Registration card No. 11475 was marked Government's Identification No. 33.)

Q. (By Mr. Yeager): Mrs. Ellermeier, I hand you Government's Identification 33. I wonder if you could identify that, please?

A. Yes, it is our card. Is that sufficient?

Q. What type of a card is it?

A. It is a registration card of the motel.

Q. Will you state whether or not you received such cards for persons that stay at your hotel?

A. Yes.

Mr. Taylor: Just a moment. I am going to object to any further direct examination on this, regarding this card until such time as the witness can identify one of the defendants as the person who signed that card.

Mr. Yeager: Your Honor, we are simply laying a foundation to introduce this as a business record, and I am trying to establish that it is under her control and it is [124] kept in the normal course of business, your Honor. It is not identifying the defendants at all.

Mr. Taylor: It must be connected with the defendants, your Honor, before it can be introduced in evidence.

The Court: Objection overruled.

Q. (By Mr. Yeager): Will you answer the question, please.

(Testimony of Rita A. Ellermeier.)

(The reporter read the question as follows:
“Will you state whether or not you received such cards for persons that stay at your hotel?”)

A. Yes, we do. With every person that is registered this is the time that they sign when they come in.

Q. And what do you do with those cards, Mrs. Ellermeier? A. Well, after they check out?

Q. After the card has been properly filled out?

A. Well, then it is placed in a rack according to the room that they are registered in and it is left there until the following morning when they check out or whatever day they check out.

Q. Now, would you state whether or not this is an original record kept under your supervision and custody? A. Yes, it is the original.

Q. Was it the regular course of business to keep such records in operating your hotel?

A. Yes, according to the law you have to keep them five years. [125]

Mr. Yeager: Your Honor, at this time I offer into evidence the Registration Card pursuant to Title 28, Section 1732, as a business record.

Mr. Taylor: We are going to object, your Honor. It is not an official record and it is in no way connected with any one of the defendants, no identi-

(Testimony of Rita A. Ellermeier.)

fication any one of these defendants is the person whose name appears on that card.

The Court: Objection overruled.

The Clerk: Government's Exhibit "B."

(Government's Identification No. 33 was received in evidence as Government's Exhibit "B.")

Q. (By Mr. Yeager): Mrs. Ellermeier, I hand you herewith Government's Exhibit "B," the registration card. I wonder if you could explain that to the court and the jury, please.

A. Well, the data on the card, is that what you want me to explain?

Q. What you see thereon.

A. Well, the name, Mr. and Mrs. Wesley Kehert at 421 Knoblock Avenue, Jeffersonville, Indiana. They were registered in Room 56. The date was 6-21-53. They were two in a party. The rate was \$10.00. The license number was WB8357. The make of their car was a Buick.

Q. Now, I wonder, Mrs. Ellermeier, if you state whether or not everything you put on there is done under the course of your regular business [126] there?

A. Yes, it is normal procedure.

Mr. Yeager: You may take the witness, Mr. Taylor.

(Testimony of Rita A. Ellermeier.)

Cross-Examination

By Mr. Taylor:

Q. Mrs. Ellermeier, will you look around this courtroom and state whether or not you can identify the person who made out that card?

A. I cannot.

Q. That Kehert that made out that card was registered from Indiana; is that right?

A. Yes, sir.

Q. How many rooms do you have in your hotel?

A. We now have eighty.

Q. Eighty?

A. At that time we had seventy.

Q. When were you first asked to make a search for this card, Mrs. Ellermeier?

A. Sometime in October, if I'm not mistaken. I can't—

Q. Last October? A. Yes.

Q. And were you subpoenaed to come to Fairbanks for this trial? A. Yes, I was.

Q. And when did you leave Denver?

A. Sunday.

Q. Ticket furnished by the government, [127] was it? A. Yes, when I am released.

Q. What? A. When I am released.

Q. So you don't know then, Mrs. Ellermeier, whether or not one of the defendants here is the same person that stayed in the hotel?

A. I can't say truthfully, no. I cannot state that

(Testimony of Rita A. Ellermeier.)

truthfully, no. We get hundreds of people a day. I can't identify them truthfully.

Q. So what if the name of the registrant on that day had been John Smith; do you get many John Smith's? A. No, we don't.

Q. Or John Jones once in a while somebody comes in that way? A. Not normally, no.

Q. Or William Johnson?

A. Well, we have a few that that is their correct name, yes.

Q. And if the name would have been William Johnson and you had been subpoenaed up here with a card you would have been in the same predicament you are now. You don't know whether a man named Kehert is on trial or not, do you?

A. Not truthfully, no.

Mr. Taylor: That's all.

Mr. Yeager: Just one question, I believe. [128]

Redirect Examination

By Mr. Yeager:

Q. In the normal course of your business do you check for the identity of your occupants?

A. No, we don't. Anybody that comes in, yes, if that's what you mean.

Q. Do they fill out that card themselves?

A. They do, yes.

Mr. Yeager: That's all.

Mr. Taylor: That's all.

(Testimony of Rita A. Ellermeier.)

Mr. Stevens: Thank you very much, Mrs. Ellermeier.

Mr. Yeager: Your Honor, may we excuse this witness to return to her home in Denver?

Mr. Taylor: I have no objection, your Honor.

(Witness excused.)

Mr. Yeager: Your Honor, may we have a recess at this time?

The Court: Let's see, Mr. Clerk, we have something on during the noon hour?

The Clerk: We do, your Honor, at one-thirty.

The Court: We are going to take an adjournment in a few seconds until 1:30. The jury will not be required to return until two o'clock. Make the adjournment. One moment. I would like to caution you a little during the noon hour. You should not talk about the case or the parties or to permit anyone to talk about it within your hearing. [129] Keep your minds free from an opinion as to the guilt or innocence of these defendants until the case is finally submitted to you.

The Clerk: Court is recessed until 1:30.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of Court proceeded to call the roll.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Taylor: Defendants are ready, your Honor.

Mr. Stevens: Government is ready, your Honor.

The Court: Very well. Proceed.

RUTH E. HOFFMAN

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Would you state your name to the court, please? A. Mrs. Ruth E. Hoffman.

Q. And where do you live, Mrs. Hoffman? [130]

A. 1535 South Broadway, Denver, Colorado, Royal Motel.

Q. And what is your occupation?

A. We own the Royal Motel.

Q. Now, in operating your hotel, Mrs. Hoffman, do you or do you not keep records of registrations?

A. Yes, sir.

Q. Do you know if you are required to keep such records? A. Yes, sir.

Q. And what requires you to keep such records?

A. The FBI requires us to keep records for five years, sir, on file at all times.

Q. And do you have the records under your supervision at the Royal Motel? A. Yes.

(Testimony of Ruth E. Hoffman.)

Q. Before coming to Fairbanks, Alaska, Mrs. Hoffman, did you make a check of your records?

A. Yes, sir.

Q. And will you state did you or did you not find there a registration made to Bennett and family?

A. Yes, sir.

Q. Do you have that registration with you?

A. Yes, sir.

Mr. Yeager: May I have it, please. Mr. Clerk, may we have this marked for identification?

The Clerk: Government's Identification [131] No. 34.

(Registration card bearing number 7507 was marked Government's Identification No. 34.)

Mr. Yeager: Would you like to see this, Mr. Taylor?

Q. (By Mr. Yeager): Now, Mrs. Hoffman, I hand you here Government's Identification 34. I wonder if you could identify that, please?

A. Yes.

Q. And what is that?

A. The registration. You want me to read it?

Q. Just explain what it is?

A. It is a registration card that we register in our guests with. We register the name, where they are from, the date, the unit they are in and the license and make of their car.

Q. And were these records kept by you in the regular course of your business?

A. Yes, sir.

Q. And I believe you have stated this before, but

(Testimony of Ruth E. Hoffman.)

is it correct that it is the regular course of your business to keep such records?

A. Yes, sir, we are required to by law.

Q. And this is the original record kept under your supervision? A. Yes.

Mr. Yeager: Your Honor, I offer this into evidence, Identification 34. [132]

Mr. Taylor: We object, your Honor, upon the grounds that it has not been connected with the offense set forth in the Indictment or with either one of the defendants.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "C."

(Government's Identification No. 34 was received in evidence as Government's Exhibit "C.")

Mr. Taylor: I don't believe the proper foundation was laid either, your Honor, for the introduction of this exhibit.

Q. (By Mr. Yeager): Now, Mrs. Hoffman, did you have control of the motel at the June 21st, 1953?

A. No.

Q. Who did have control of that?

A. Bond E. Lane owned it. There was a manager in there, Mr. and Mrs. Richardson. We bought the place, consequently bought the records, but we didn't have control of the motel at the time.

Q. Now, will you state did you or did you not buy all the records?

(Testimony of Ruth E. Hoffman.)

A. Yes, sir, the past five years' records.

Q. And this Government's Exhibit that you hold in your hand is part of those records that you bought?

A. Yes, sir. [133]

Q. And they are now under your control?

A. Yes, sir.

Q. Now, will you, please, explain to the court and jury what that registration purports to show?

A. You mean the name on it? You want me to read the name on it or what?

Q. Yes, please.

A. J. J. Bennett, wife and family, Odessa, Texas. The date is, or the unit they stayed in was 11 and 15. The date is 6-21-53. The number in the party, four. It was a Cadillac, BB 6235.

Q. Now, Mrs. Hoffman, in the regular course of your business and operation there, do you have, do you fill those out yourself?

A. Yes, sir. The guest fills out his name, address, the make and license number on his car and we fill out the rest of it.

Mr. Yeager: Thank you. That's all. Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. You had nothing to do with making this card out, did you?

A. No, sir, we didn't even own the place at that time.

(Testimony of Ruth E. Hoffman.)

Q. And do you see Mr. Bennett or his family in this courtroom? [134]

A. I don't know Mr. Bennett. I wasn't even there. How could I?

Q. And you don't know, then, whether Mr. Bennett is on trial here is the person that stayed at the hotel?

A. I wouldn't know anything about it.

Q. What is the name of the hotel?

A. Royal Motel.

Q. Now, you stated, I believe, in response to a question by Mr. Yeager, that the FBI requires you to keep records?

A. I don't know as the FBI do, but we have to have records there that the FBI or any officer of the law can check on at any time they want to.

Q. That is your conclusion?

A. That's my own conclusion. It is a state law that we file those records.

Q. You know the FBI don't make any records?

A. I don't know who makes the records.

Q. They might try to but they don't make them. So you don't know Mr. Bennett?

A. No, I don't know Mr. Bennett. It is authentic. It was brought here because they wanted it.

Q. You were subpoenaed, were you?

A. Yes, sir.

Q. And you don't know whether this Bennett is the Bennett that stayed at your place? [135]

A. No, sir, all I know is the record is authentic.

Q. Do you know who made the record out?

(Testimony of Ruth E. Hoffman.)

A. Yes, I do.

Q. Do you know who made these notations down here?

A. No, I don't, whether he did or the clerk did.

Q. You found this in your records, did you not?

A. They were in our records.

Q. All you know is they were there?

A. Yes, sir.

Q. You don't know who made it out, who this Bennett is? A. I know the record was filed.

Q. You know that you live in Denver and are running the Royal Motel; is that right?

A. Yes, sir.

Q. That's about all you know about this case, isn't it? A. Yes, sir.

Mr. Taylor: That's all, Mrs. Hoffman.

Mr. Yeager: Your Honor, may we excuse this witness, Mrs. Hoffman, to return to Denver, Colorado?

The Court: Any objection, Mr. Taylor?

Mr. Taylor: No objection.

The Court: She may be excused.

(Witness excused.)

Mr. Stevens: Artie Reynolds, please. He is in the hall, I believe. [136]

ARTIE REYNOLDS

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Would you state your name, please?

A. Artie D. Reynolds.

Q. And where do you live, Mr. Reynolds?

A. Denver, Colorado.

Mr. Stevens: Would you like to use this, please, and speak right into it just like that.

The Witness: Denver, Colorado, 385 South Pennsylvania.

Mr. Taylor: Just a moment, your Honor. I am going to object to this witness testifying as he has spent considerable time in this courtroom, all this forenoon practically all the forenoon he was sitting on that seat over there. He was sitting alongside——

The Court: You were not listening?

Mr. Reynolds: Not on this trial, no, sir.

Mr. Stevens: Mr. Reynolds, were you here during the questioning of the jury?

Mr. Reynolds: Yes, sir.

Mr. Stevens: You heard the exclusionary rule?

Mr. Reynolds: Yes, sir.

Mr. Stevens: You stayed outside during the course of this trial?

Mr. Reynolds: Yes. [137]

The Court: Objection is overruled, Mr. Taylor. It doesn't appear (interrupted)——

Mr. Taylor: I saw the man sitting on the bench,

(Testimony of Artie Reynolds.)

your Honor, also the woman that testified this morning. She sat there, too, together while this testimony was taken.

The Court: The Witness said he wasn't in here during the testimony.

Mr. Reynolds: Only time I was in here was just about 11:30 on a colored lady, a trial right here. The judge gave her six months suspended sentence and \$100 fine.

Mr. Stevens: You mean 1:30, Mr. Reynolds.

Mr. Reynolds: Yes, sir, about that time.

Q. (By Mr. Stevens): Where do you work in Denver, Mr. Reynolds?

A. I work out at 49th and Lowell, tavern right now, at present.

Q. Where did you work before that?

A. 295 South Broadway, Al's Service Station.

Q. Did you work there in the month of June, 1953?

A. Yes, sir.

Q. And what were your duties there, Mr. Reynolds?

A. I was servicing automobiles.

Q. Would you state, Mr. Reynolds, if during the month of June, 1953, you saw Mr. Bennett, the defendant in this case, in Denver?

A. I saw him, and I don't know whether it was his wife and two other girls and a boy. [138]

Q. And what type of a car was he driving?

A. He was driving a Mercury, and the lady was driving a Cadillac, around a '50 or '52 model.

Q. And did you perform any service on these vehicles?

(Testimony of Artie Reynolds.)

A. I serviced the two cars on one day, and then they brought a Buick back the next day which I changed the oil and greased and put gas in it.

Q. Did you see any other members or any other people with them at that time?

A. These three, two girls and one boy.

Q. What type of vehicle did they have; do you remember?

A. I think it was a black Buick, or a dark blue. It was a late model.

Q. Did you have a conversation with Mr. Bennett at that time? A. Yeah, when he drove in.

Q. Just a moment. Did you have one, please?

A. Yes, sir.

Q. And what day was that on, do you remember?

A. That was the first day they came in. I don't remember just the exact date, but it was in the latter part of June.

Q. Was there anyone with him at that time?

A. A lady drove in in a Cadillac in the next driveway and he told me just to hold on, I could service both of them.

Q. And will you tell us the conversation that you had, please? [139]

A. Well, I serviced the Mercury first with gas and put my foot up on the back bumper and I seen it was a Texas license and, of course, I have been all over Texas and I asked him what part he was from, and he said he was from Odessa, I believe, and I have been at Odessa and, of course, after I talked to him there for awhile on that subject about Texas

(Testimony of Artie Reynolds.)

and all and he asked me where there would be a good place to stay, and I recommended a place down on South Broadway.

Mr. Stevens: Pardon me, your Honor. There is an emergency call out here. May I take it and have five minutes' recess, please?

The Court: Yes.

Mr. Yeager: Your Honor, I believe Mr. Stevens asked if we might have a five-minute recess. He has a long distance telephone call, your Honor.

The Clerk: Court is recessed for five minutes.

(Thereupon, at 2:23, the court took a recess until 2:32 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. Thank you, sir.

The Court: Very well. Proceed. [140]

ARTIE REYNOLDS

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination:

By Mr. Stevens:

Q. Mr. Reynolds, you were telling us the conversation you had with Mr. Bennett?

A. Yes, sir. He told me he was from Odessa, Texas, and I have been around there so I asked him

(Testimony of Artie Reynolds.)

what line of work he was in and he told me he was in the oil business, so he asked me then how about a nice place to stay, and I recommended a place further down South Broadway, out on River, out on Santa Fe Drive which is out on the highway toward Albuquerque; and the next morning I was by myself and three cars drove in and I let them park there and he asked me to service the Buick, and they had been back after it after they got through eating, and so they left. That was the last time I saw them, when they come back.

Q. How many were in the three cars when they came in?

A. They were five all together, three girls and two men.

Q. Did you by any chance see a dog at that time?

A. A little dog in the Cadillac with the lady.

The Clerk: Government's Identification No. 35 and Government's Identification No. 36.

(Two (2) gasoline credit card receipts were marked Government's Identification Nos. 35 and 36, respectively.) [141]

Q. (By Mr. Stevens): Mr. Reynolds, these are Government's Identification 35 and 36. Could you identify those for us, please?

A. Well, that is my handwriting and we have a machine that stamps the credit cards like this. Al's Service Station, Standard Service.

Q. Is that the same place that you worked?

A. Yes, sir.

(Testimony of Artie Reynolds.)

Q. In Denver, Colorado?

A. In Denver, Colorado.

Q. And you believe that you made those tickets out?

A. Well, I know I did.

Q. And in which car did you put the gasoline?

A. I put the gas in the Mercury first and then in the Cadillac and gave them one ticket with the credit card here twenty-one gallons and one-tenth in both cars.

Q. And then is the other ticket for another time?

A. The next day why I serviced this Buick and changed the oil and greased the car and put a little gas in it, seven gallons, a little over.

Q. And all of the services you performed in the service station were placed on the one-charge ticket?

A. On the same ticket, not all of them. I serviced the Mercury and Cadillac the first day on the same ticket.

Q. My question really is, though, did you charge them to the same credit card through the same operation? [142]

A. Yes.

Q. All the service you performed on the three cars went to the same ticket actually?

A. No, there is two tickets here.

Q. No, I mean to the same credit card?

A. Oh, yes, same credit card.

(Testimony of Artie Reynolds.)

Cross-Examination

By Mr. Taylor:

Q. Who is the credit card in the name of?

A. Well, it is not listed here. Bennett signed the name.

Q. Well, what is the first name?

A. Well, I don't know. We have a stamping machine. We just put it in and stamp it and then the customer signs his name to it.

Q. Put on your glasses and see if it isn't W. W. Bennett?

A. W. W. Bennett.

Q. Is that right?

A. It must be. It is here on one of them.

Q. You wrote it, didn't you?

A. No, sir. He signed his name on here. I haven't got nothing on it but the amount of gas and the price.

Q. That is not Jack or John Bennett, is it?

A. It's got W. W. Bennett on here.

Q. Now, you say there was a man named Bennett and two [143] girls and another fellow came down there?

A. I said the first day they came in was Bennett and some girl in a Cadillac. The next day he brought the Buick with the other three in it.

Q. Well, when was it that there were five in the car?

A. The next day.

Q. The third day?

A. The next day. The first day they came in

(Testimony of Artie Reynolds.)

there was just two. That was Bennett in the Mercury and some lady driving the Cadillac. The next day they came in with a Buick, Cadillac and Mercury and parked them and I serviced the Buick.

Q. Now, you got me all confused. Mr. Bennett came down driving a Buick?

A. No, sir, he came in a Mercury the first day.

Q. Was there anybody in the Mercury with him?

A. No, sir.

Q. Then you say there was a Buick came down?

A. The next day.

Q. Who was in it that time?

A. I don't know who was in the Buick. Who was in the Mercury or the Cadillac. They came in, said he had another car. They were parked out there at the parking lot, asked me to service the Buick.

Q. Do you see any of the people in this courtroom?

A. Two, yes. [144]

Q. Which two?

A. This fellow here and this slender girl sitting back there. She was driving the Cadillac.

Q. Do you know who she was?

A. I don't know. No, sir, I don't know.

Q. You don't know whether or not that is Mrs. Bennett?

A. I don't know.

Q. Mr. Bennett introduce any of these girls to you?

A. No, sir.

Q. Were you subpoenaed to come up here?

A. Yes, sir.

Q. To testify that these people got some gasoline in Denver?

(Testimony of Artie Reynolds.)

A. Well, I don't know. They just handed me the paper and told me to be here at ten o'clock Monday morning. Didn't tell me what it was for. They told me, too, it was about (interrupted)——

Q. Did you—were you to bring any records?

A. No, sir.

Q. How did you happen to have those two slips with you?

A. I didn't have them. They were here.

Q. What?

A. The prosecuting attorney just now gave them to me. First time I seen them.

Mr. Taylor: That's all. [145]

Mr. Stevens: Just one moment, please.

Redirect Examination

By Mr. Stevens:

Q. Did you see these cars leave the station, Mr. Reynolds?

A. No, sir. I was there by myself and I was pretty busy. I didn't see them when they left.

Mr. Stevens: Thank you very much. Your witness, Mr. Taylor.

Mr. Taylor: No further questions.

Mr. Stevens: Thank you, Mr. Reynolds. Your Honor, may we ask that Mr. Reynolds be excused. Do you have any objections, Mr. Taylor?

Mr. Taylor: No objections.

The Court: He may be excused.

(Witness excused.)

Mr. Stevens: Mr. Burton, please.

WILLIAM HENRY BURTON

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. William Henry Burton.

Q. Where do you reside, Mr. Burton?

A. Oliver, B. C., Canada. [146]

Q. And what is your occupation?

A. Canadian Immigration Inspector.

Q. And where are you stationed?

A. Permanently at Osoyoos, B. C., Canada.

Q. Would you tell us whether or not that station is on the Canadian-American border?

A. It is.

Q. And what are your duties as Immigration Inspector?

A. Enforce the provisions of the Canadian Immigration Act.

Q. And in the course of your duties do you check vehicles as they travel from the American side of the border through the Canadian side?

A. Yes, sir.

Q. Were you working at Osoyoos in June of 1953?

A. I was.

Q. Did you have occasion in June of 1953, to inspect the vehicle of or a vehicle driven by Mr. Bennett, the defendant in this case?

A. I did.

(Testimony of William Henry Burton.)

Q. Do you remember when that was, Mr. Burton?
A. The date or the time of the day?

Q. The date?

A. It was somewhere around the 23rd, 24th of June.

Q. Who was with Mr. Bennett at the time?

A. No one. [147]

Q. Do you remember the time?

A. It was about twenty minutes to four.

Q. Did you notice whether there was anything else in the car with him at the time?

A. Yes, he had other items in the car with him.

Q. Did you notice whether or not he had a dog in the car with him?
A. He did.

Q. And what type of dog was that, do you know?

A. It was a small, I believe a Mexican Chihuahuas.

Q. Did you ask him any questions at the time he made entry to your country, Mr. Burton?

A. I did.

Q. And after asking him these questions, what did you do?

A. I admitted Mr. Bennett in transit to Alaska.

Q. Did you notice any other cars at the border at the time you checked Mr. Bennett's car?

A. Yes, sir, I did.

Q. And where were these cars when you were checking Mr. Bennett's car?

A. They were also at the Canadian-American Immigration Station at Osoyoos, but behind Mr. Bennett.

(Testimony of William Henry Burton.)

Q. Did you notice what type of cars they were?

A. One was a Cadillac and the other was a Mercury, hard-top. [148]

Q. Did you have occasion to check those vehicles also? A. No, sir.

Q. Could you tell us why you did not check those vehicles, too?

A. Well, four o'clock is the time I come off shift, and that was the last car I checked that night was Mr. Bennett's.

Q. Did you see Mr. Bennett after you left your station at four o'clock? A. Yes, sir.

Q. And where did you see him?

A. Approximately five miles south, five miles north of the international boundary.

Q. And what happened, what attracted your attention to Mr. Bennett?

A. Well, the excessive speed of the vehicles approaching behind me and passing me was the first thing that attracted my attention.

Q. By vehicles, what vehicles passed you?

A. The three. There were three vehicles in the procession, the Cadillac of Mr. Bennett's, a Buick, and a Mercury, hard-top.

Q. And what did these vehicles do; did you say they passed? A. They passed me, yes, sir.

Q. And what did you do at that time? [149]

A. Well, out of curiosity I attempted just to see how fast they were going, and I got up to seventy miles an hour and I stopped, slowed down at that point.

(Testimony of William Henry Burton.)

Q. Did you see these vehicles again?

A. Yes, sir.

Q. When did you see them?

A. Approximately fifteen miles north of the international boundary stopped on the roadside.

Q. And were all three of the vehicles stopped at the side of the road? A. They were.

Q. Did you notice any of the occupants at that time? A. Yes, sir, I did.

Q. What were they doing?

A. Mr. Bennett was talking to the other occupants of the other two cars.

Q. And what did you do then, Mr. Burton?

A. Well, I passed them and I proceeded to my home at Oliver.

Q. And did you see those people again after that?

A. Yes, sir, when they passed me again when I stopped at my gate.

Q. Did you observe the occupants of the other vehicles at all; could you tell us how many individuals were in each of the other vehicles?

A. One in the Buick and four in the Cadillac, in the Mercury hard-top. [150]

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. You say you didn't check the other two cars?

A. No, sir, I did not.

(Testimony of William Henry Burton.)

Q. Just the one Mr. Bennett was in?

A. That's right, sir.

Q. What does that check consist of?

A. Well, sir, that I am afraid that is a provision under the Canadian Immigration Act and as an Immigration Inspector I am now allowed to actually divulge it.

Q. What do you do?

A. Case of examining the person seeking admission to Canada.

Q. Just a little identification; is that about right?

A. You identify the person.

Q. They produce identification that they are the person they claim to be, do they not? A. Yes.

Q. And who checked the other two cars?

A. I have no idea, sir.

Q. You see any of the occupants of those other cars in the room? A. Of the other cars?

Q. Yes.

A. I couldn't identify them, sir. [151]

Q. And do you recognize Mr. Bennett in this courtroom? A. I think so, sir.

Q. Would you point him out?

A. I think that gentleman sitting there is Mr. Bennett.

Q. You just think it is?

A. Well, that (interrupted)——

Q. Do you remember seeing the other man at the end of the table? A. No, sir.

Q. Could that have been Mr. Bennett? Now,

(Testimony of William Henry Burton.)

look at both of them and tell me which is Mr. Bennett?

A. Well, that one I feel sure that that is Mr. Bennett.

Q. You are not absolutely sure though, are you?

A. Well, from my identification I would say so, sir.

Q. Now, you say that was four o'clock in the afternoon. What day of the week was it that they went through there?

A. That I couldn't say, sir.

Q. You don't know the day of the month?

A. No, sir.

Q. Don't know the day of the week?

A. No, sir.

Q. You know the year? A. 1953, sir.

Q. Oh, it was, but you know it was four o'clock in the afternoon? [152] A. I do, sir.

Q. You know what month it was?

A. June, sir.

Q. You are pretty sure it was June?

A. Yes, sir.

Q. Couldn't have been July? A. No, sir.

Q. Now, what makes you so sure it was June?

A. Well, it certainly couldn't have been July, sir, because I purchased a brand new car in the first of July and I still had my old car at that time, so it would have to be in June.

Q. How about May? A. No, sir.

Q. You have the old car in May?

A. Yes, sir.

(Testimony of William Henry Burton.)

Q. Would your new car make seventy miles an hour?

A. I wouldn't do it at that time, sir.

Q. You subpoenaed to appear up here, Mr. Burton?

A. Yes, sir.

Q. Now, the fact that that was in June when you got notice to come up here, Mr. Burton, was you required to refresh your memory as to time of Mr. Bennett passing through the customs in June of 1953?

A. Required to what, sir?

Q. To refresh your memory as to Mr. Bennett's passing through sometime in June, latter part of June? [153]

A. Well, I, myself, in my own memory I checked back.

Q. I mean were you requested when you were to come up here to refresh your memory?

A. Not by any of the members of the United States Justice Department, sir.

Q. How did you happen then to come up here without knowing what you were coming up for?

A. Well, under the subpoena, sir.

Q. And was anything said to you or written to you about who was on duty at the time that Mr. Bennett passed through?

A. Well, not from this department, sir.

Q. Well, from what department did you get it from?

A. I was asked if I was on duty. There was nothing—yes, I was asked if I was on duty when Mr. Bennett came through, yes, sir.

(Testimony of William Henry Burton.)

Q. So you refresh yourself then from the record, refreshed your mind from the record that Mr. Bennett went through at a certain time in July or in June? A. In June.

Q. In June, that's right? A. Yes, sir.

Q. Before you got the new car?

A. Yes, sir.

Q. Still had the old one?

A. Yes, sir. [154]

Q. How do you pronounce the name of that town? A. Osoyoos.

Q. How do you spell it? A. O-s-o-y-o-o-s.

Q. Is that really a town?

A. There is a town there, sir, yes, sir.

Q. You live in it? A. Not right now, sir.

Q. That's right on the border?

A. Two miles north.

Q. Is that from the Washington, from the State of Washington?

A. That's from the international boundary.

Q. Yeah, at Washington, between Washington and Canada? A. Yes, sir.

Q. Now, when you went on up the highway after you passed these three cars on the road, the next time you saw them they passed you again?

A. Yes, sir.

Q. And what order were the cars when they passed you at that time?

(Testimony of William Henry Burton.)

A. Mr. Bennett, the Cadillac was leading, the Buick, and then the Mercury.

Q. Who was driving the Cadillac?

A. Mr. Bennett, sir.

Q. Who was driving the Buick? [155]

A. Well, I couldn't say, sir, as not having passed these people through Immigration. The only thing from knowledge would be Mr. Kehert.

Q. Mr. who? A. Kehert.

Q. Did you pass Mr. Kehert through the customs? A. No, sir.

Q. You mean Mr. Bennett?

A. I passed Mr. Bennett, but the other two cars I had nothing to do with at the international boundary or afterwards.

Q. Where did Mr. Kehert come into your mind now? How did you happen to use the word Kehert? Somebody tell you that they are trying to convict somebody named Kehert? A. No, sir.

Q. Where did you get that name?

A. I don't know.

Q. Where did you ever hear that name before?

A. The word Keherts or Kehert?

Q. You said it; what is the word?

A. I used the word, Kehert.

Q. Where did you first use that name?

A. That isn't the one I meant, sir.

(Testimony of William Henry Burton.)

Q. Who did you mean? A. Kehert.

Q. Who is Kehert? [156]

A. He is one of the people involved in this trial, but I have no idea who.

Q. And where did you first hear the word?

A. On my subpoena,

Q. Oh, on your subpoena. So you don't know which is Mr. Kehert and which one is Bennett?

A. I think I know Bennett.

Mr. Taylor: I think that's all.

Redirect Examination

By Mr. Stevens:

Q. Mr. Burton, how do you happen to remember this transaction?

A. Well, through the sequence of events that happened, sir. It is most unusual that something like that should occur as I have stated here.

Q. And did you at the time become inquisitive concerning these cars? A. Yes, sir.

Q. What did you do concerning those cars?

A. Oh, I took the license numbers down, sir.

Q. And do you still have those license numbers?

A. No, sir.

Q. And when were you first contacted concerning this by the United States Government, Mr. Burton? A. You mean this time, or the first?

Q. Originally? [157]

A. Originally. It was about late August or early September, I believe, of 1953.

(Testimony of William Henry Burton.)

Q. And did you make a record of your observations at that time? A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Recross-Examination

By Mr. Taylor:

Q. Mr. Burton, did a man named Harkabus who claimed to be an FBI man come through there about August and question you about this matter?

A. No, sir.

Q. Who talked to you about it?

A. Mr. * * * gee, I don't know his, I forget his name, sir.

Q. What official capacity did he occupy?

A. A member of the Federal Bureau of Investigation.

Q. Mr. Worsham? A. No, sir.

Q. Mr. Sullivan? A. No, sir.

Q. Edgar Hoover? A. No, sir.

Q. Did he show you his credentials?

A. Yes, sir.

Mr. Taylor: That's all. [158]

Mr. Stevens: Thank you very much, Mr. Burton. Do you have any objection to the government's excusing Mr. Burton?

Mr. Taylor: No objection.

Mr. Stevens: With your permission, your Honor.

The Court: He may be excused then.

(Witness excused.)

Mr. Stevens: Mr. Taylor, would you have any objection to Mr. Burton watching the proceedings in United States Court?

Mr. Taylor: I have no objection, no.

Mr. Stevens: Vern Murphy, please.

VERN V. MURPHY

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Vern V. Murphy.

Q. Where do you live, Mr. Murphy?

A. Trail's End Motel.

Q. Is that in Fairbanks, Alaska?

A. It is in South Fairbanks.

Q. Do you know Wesley Kehert?

A. Yes, I do.

Q. How long have you known Wesley [159]
Kehert? A. Since 1951.

Q. And where did you meet him, please?

A. At my motel.

Q. Were you connected in business at all with
Mr. Kehert at that time? A. No, sir.

Q. Did you enter into any type of enterprise
with him at that time? A. No, sir, I didn't.

Q. Calling your attention to August of 1951, did
you know Wesley Kehert then? A. Yes, sir.

Q. Did you ever know him as Steve?

(Testimony of Vern V. Murphy.)

A. Yes, sir.

Q. And in August of 1951 did you prepare to conduct any type of business with him?

Mr. Taylor: Just a moment, your Honor, I am going to object upon the grounds that anything that transpired in 1951, I can't see where it is relevant or material to the issues in this. The question is leading also. We are going to object to it.

The Court: Just what is the reason for it?

Mr. Stevens: I will be glad to make an offer of proof, your Honor.

(The following proceedings were had out of the hearing of the jury.) [160]

Mr. Stevens: Your Honor, the government's offer of proof is that in 1951 Mr. Kehert and Mr. Murphy, who is the witness, bought a Quonset Hut and they set it up beside the Trail's End Motel and that this was set up for the purpose of prostitution and that again in 1953 when Mr. Kehert returned here he put Miss Casey into the same Trail's End Motel for the purpose of prostitution.

Mr. Taylor: I think anything that transpired in 1951 would not be—— (Interrupted.)

The Court: Objection overruled.

(The following proceedings were had in the hearing of the jury.)

Mr. Stevens: Would you read the question, please?

(Testimony of Vern V. Murphy.)

(The reporter then read the question as follows: "And in August of 1951 did you prepare to conduct any type of business with him.")

A. We prepared to, yes.

Q. (By Mr. Stevens): And what did you do to prepare for this business?

A. What did we do?

Q. Yes.

A. Well, we started to fix the interior of a building.

Q. What type of building was it, Mr. Murphy?

A. It was a Quonset Hut.

Q. And where was that Quonset Hut located?

A. Behind the motel. [161]

Q. Is that the Trail's Inn Motel or Trail's End?

A. Trail's End.

Q. And how did you remodel this Quonset Hut?

A. Well, we had a bar and a lunch counter in the front and two tables and four rooms

Q. And what type of rooms were these?

A. Well, they were sleeping rooms.

Q. And what was the purpose of fixing up this Quonset Hut?

A. Well, at that time it was for the purpose of operating a bawdy house.

Q. Now, did you meet Mr. Kehert again this year, or last year, in 1953? A. Yes, sir.

Q. And do you remember approximately when it was, please?

A. Approximately the first of July.

Q. And where did you see him?

(Testimony of Vern V. Murphy.)

A. At the motel office.

Q. Was he alone? A. Yes, sir.

Q. And do you remember approximately what time it was? A. Around noon.

Q. And did Mr. Kehert ask you a question at that time? A. He asked me——

Q. Or did you have a conversation at that [162] time? A. He asked me if I had a vacancy.

Q. And by that did he mean in your Trail's End Motel? A. In the motel, that's right.

Q. And how many people did he ask if you had a vacancy for?

A. He didn't, just asked me if I had a vacancy.

Q. And did you have one, Mr. Murphy?

A. Yes, sir.

Q. And did Mr. Kehert engage that vacancy?

A. Yes, sir.

Q. And who moved into that vacant room?

A. As far as I know, Mr. Kehert did.

Q. Did you ever see a blonde girl known as Marilyn Jean Casey?

Mr. Taylor: Just a moment. We are going to object to a leading question, your Honor.

The Court: Leading. It is leading. I will sustain the objection.

Q. (By Mr. Stevens): How long did Mr. Kehert rent that cabin, Mr. Murphy?

A. Approximately three days.

Q. And what happened at the end of the three days?

(Testimony of Vern V. Murphy.)

A. Well, I heard that they were picked up or there was a raid of some kind.

Mr. Taylor: I didn't get that answer. [163]

Mr. Murphy: I heard that they just left, had been picked up. I read it in the paper. Different people had told me they had been picked up on some charge.

Q. (By Mr. Stevens): And by that, do you mean the occupants of the room that you had rented?

A. As far as I am concerned, there was no occupants, Mr. Stevens. It was just Mr. Kehert that rented the cabin.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Now, Mr. Murphy, how long you been in business at the Trail's End Motel?

A. Since '49, December of '49.

Q. And then you say in 1951 you fixed this Quonset up as a bar, you say there was a bar?

A. Yes, sir.

Q. And a lunch counter? A. Yes, sir.

Q. And some rooms in the back?

A. Separate, yeah.

Q. Now, was those rooms also sleeping rooms?

A. Yes, sir, they were.

Q. And at the time you fixed it up, why you had in mind then also possibly people use it for assignation?

A. Yes. [164]

(Testimony of Vern V. Murphy.)

Q. Was it ever used for that?

A. No, absolutely no.

Q. So the intentions that you had at that time were never fulfilled? A. No, sir.

Q. So then Mr. Kehert came there alone and rented a room in that same building in 1953?

A. In 1953 he rented a cabin, number 12, in the motel.

Q. Oh, it was a cabin? A. Yes, sir.

Q. And not in the Quonset Hut?

A. Yes, sir.

Q. You say he stayed there about three days?

A. Yes.

Q. Then you heard he had been picked up by the police? A. Yes.

Q. Did you rerent the cabin then to somebody else? A. I did, yes.

Q. Do you work in any of your operations out there, Mr. Murphy, around your restaurant, or—

A. Well, I just operate the motel. I leased the restaurant building.

Q. And in '51 did you have the restaurant leased?

A. No, I operated the restaurant then.

Q. You operated it yourself?

A. Yes. [165]

Mr. Taylor: I believe that's all.

(Testimony of Vern V. Murphy.)

Redirect Examination

By Mr. Stevens:

Q. Mr. Murphy, did you see Mr. Bennett at your motel in June of 1953?

A. No, sir, I did not, not Mr. Bennett. You mean by that the first part of July when I seen Mr. Kehert?

Q. Well, anytime around in that period of time did he come there to see Mr. Kehert at all?

A. No, I didn't see Mr. Bennett at all.

Q. And did you see Mr. Kehert staying in the cabin, number 12?

A. I didn't see anyone there at all. I didn't see anyone come or go in that cabin.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: I'm all through with him. That's all, Mr. Murphy.

(Witness excused.)

Mr. Stevens: May we have the recess, your Honor.

The Court: Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all members of the jury are present? [166]

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

SILAS M. PACKARD

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. State your name to the court and jury, please. A. Silas M. Packard.

Q. What is your address, Mr. Packard?

A. Tok Junction, Alaska.

Q. Do you reside there? A. Yes, sir.

Q. What is your occupation, Mr. Packard?

A. U. S. Immigration Inspector.

Q. Are you, can you state whether or not you are employed by the Immigration Service of the United States? A. I am.

Q. How long have you been so employed?

A. Let's see, twenty, twenty-three years.

Q. In what, in this position I wonder if you could state if any, what your duties are?

A. To examine people entering Alaska from Canada at the present post.

Q. As a part of your official duties are you required to make reports on persons that go through your station at Tok, Mr. Packard? [167]

A. I am.

Q. Do you have such records under your control and custody? A. Yes, sir.

Q. Do you know who requires you to keep such records?

A. My bureau, the Department of Immigration and Naturalization, and we also keep them for the

(Testimony of Silas M. Packard.)

Customs Service. It is a joint office, Customs and Immigration

Q. Now, Mr. Packard, would you or would you not have such records for June of 1953?

A. I have them with me, sir.

Q. And have you made a search through those records, Mr. Packard?

A. Yes, sir.

Q. And do those records disclose the automobiles that pass through and the drivers of such automobiles on June of 1953?

A. Yes, sir.

Q. I wonder if I may have them, please.

A. This is the whole June record.

Q. Now, Mr. Packard, you have the original records available; is that correct?

A. Yes, sir, I have.

Q. Now, will you state whether or not you have made an official copy of those records?

A. I have an official copy that I made here for one day, for a portion of a day on June 28th. [168]

Q. And is that correct with the original copy?

A. Yes, sir.

Q. And is that copy certified?

A. Yes, sir. I have signed the certification.

The Clerk: Government's Identification No. 37.

(Certified copy of Page 62 of the records of the United States Immigration and Customs Station, Tok Junction, of June 28, 1953, was marked "Government's Identification No. 37.")

Q. (By Mr. Yeager): Mr. Packard, I hand you

(Testimony of Silas M. Packard.)

Government's Identification 37; would you identify that, please?

A. This is a portion, a page from a, a copy of a page from our records of June 28, 1953, at the port of Tok Junction.

Q. And you keep those records under your control and supervision; is that correct?

A. Yes, sir.

Q. And these records are kept in the regular course of business? A. Yes, sir.

Q. And they are kept under your control and supervision, is that correct, sir?

A. Mine and another officer out there.

Mr. Yeager: Your Honor, at this time I would like to offer this into evidence under Title 28, Section 1732.

Mr. Taylor: We are going to object, your Honor, upon the grounds that the proper offer has not been made. I [169] think the proper offer is to first introduce the original and substitute a copy. When the original is in court the copy can be substituted for the original. I think to save doing that I would stipulate that you could just, stipulate that page and then substitute the copy without unbinding it.

Mr. Yeager: Would you mark that for identification? That is the original.

(The original record, from which Government's Identification No. 37 was taken, was also marked Government's Identification No. 37.)

(Testimony of Silas M. Packard.)

Q. (By Mr. Yeager): Mr. Packard, I here hand you Government's Identification 37 substituted for the other Identification I showed you; would you identify that, please?

A. This is a portion of our June 28, 1953, record of vehicles and drivers entering at the port of Tok Junction, Alaska.

Q. And is that your original entry?

A. Yes, sir.

Mr. Yeager: Your Honor, at this time I offer Government's Identification 37, the original.

Mr. Taylor: No objection. If the court please, I am going to withdraw my "no objection" and make an objection until it is shown whose handwriting that is in. That is a penciled copy. I would like to know who wrote it.

Mr. Yeager: This is offered as a business record. I don't believe that is necessary to be shown to be admissible. [170]

The Court: Proceed.

Mr. Yeager: May it be admitted, your Honor?

The Court: Well, I think you had better make your offer and let him put in his objections first.

Mr. Yeager: Your Honor, I make an offer of Identification 37.

Mr. Taylor: I object upon the grounds that the proper foundation has not been laid for the introduction of it because it has not been shown who made that record.

Mr. Yeager: Your Honor, this is a business record made under the supervision and control of Mr.

(Testimony of Silas M. Packard.)

Packard here. Made in the regular course of business.

The Court: This Identification is the original record?

Mr. Yeager: That's correct, your Honor.

Mr. Taylor: It is handwriting. I think we should know who the handwriting is.

The Court: It may be admitted.

The Clerk: Government's Identification—Government's Exhibit "D."

(Government's Identification No. 37, the original record, was received in evidence as Government's Exhibit "D.")

Q. (By Mr. Yeager): Mr. Packard, I hand you Government's Exhibit "D"; I wonder if you could state the persons and the automobiles that passed through your border in the latter part of that day? [171]

A. I can from the record here, sir. You wish me to read them off?

Q. Yes.

A. Well, this part is the part that I kept from here down.

Q. Would you read the part that you kept, Mr. Packard? A. All names?

The Court: There is no use to read all of those names, just the one you are interested in.

Q. (By Mr. Yeager): No, the ones whose names appear hereon at the bottom, Bennett, Kehert and Bennett.

(Testimony of Silas M. Packard.)

Mr. Taylor: Why don't you be sworn and testify, Mr. Yeager?

The Court: Proceed.

Q. (By Mr. Yeager): Proceed.

A. There was a Texas car, license BU-6235, four-door Cadillac driven by James J. Bennett, and an Indiana licensed car, WB-4848, Buick, two-door, driven by Wesley Kehert. No other passengers in either of those cars. Then there is a Texas licensed car, KS-7118, a Mercury coupe driven by Fern Bennett with three other passengers.

Q. Now, will you state whether or not, Mr. Packard, that is the normal procedure to ascertain who is driving the vehicles at your border? [172]

A. Yes, sir. We always do that, and we interview all of the other members of the, other passengers in the vehicle at the time, but we only keep the names of drivers.

Q. The others aside from the drivers, were they men or women?

A. They were women in the one car.

Q. All women?

A. All women, yes, sir.

Mr. Yeager: You may take the witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Whose request was the search of the records made, Mr. Packard?

A. At the, the request came with a, when I received the subpoena.

(Testimony of Silas M. Packard.)

Q. Is there occasions in which cars come through at night when the station is not open, Mr. Packard?

A. I presume it could happen. That would be an illegal entry if they did that, but——

Q. You mean if they come through at night and if you weren't there that they would have to stay until you got back?

A. They are required by law to wait until we open in the morning. In the morning there are a number——

Q. Do you have a sign there that they have to wait? A. Yes, sir.

Q. Where is that sign? [173]

A. There is about three signs on the front of the office, one facing two different ways.

Q. Now, when you examined these cars, or the occupants of the cars when they came through you took the number of the cars, didn't you?

A. Yes, sir.

Q. And the Cadillac, Mr. Bennett was driving that car, is that right? A. Yes, sir.

Q. The Buick was driven by Mr. Kehert?

A. Yes, sir.

Q. Now, where were those men at the time that you were talking to them?

A. In the office there.

Q. They weren't under the, back of the wheel then, of the car?

A. They stopped in front of the office and came from behind the wheel into the office. They are required to come in with the car papers.

(Testimony of Silas M. Packard.)

Q. And did you see these four women get out of the car? A. Yes, sir.

Q. And do you see in this courtroom the driver of the car in which the four women were in, would you——

A. I am not sure that I would remember definitely. We pass so many thousand people, probably a familiar face. Whether I would identify the person, I'm not sure. [174]

Q. And did these cars drive up there to the station just about simultaneously, one after the other?

A. Yes, sir.

Q. And the drivers all got out at the same time?

A. Not quite. The men were slightly ahead of the women. I remember that because we have one other car sandwiched in between, and they stopped and talked, stopped afterward when it come, got there, and talked a bit.

Q. And what was you doing at the time that the car with the women drove up?

A. Well, there was one other car cleared in between. I presume I was talking to the people in that other car when this one pulled up, but we watch all cars as they pull up. We have windows in front there. It is a practice to observe what is going on.

Q. And you saw four girls get out of the car and come toward your office; is that right?

A. Yes, sir.

Q. And then did Mrs. Bennett say that she was driving the Mercury?

(Testimony of Silas M. Packard.)

A. Well, I cannot remember just what she told me at the time, but from my record I have her name down as the driver, so from that she must have told me she was driving.

Q. It might have been one of the other girls driving for that matter, it didn't make any difference.

A. If the owner was along in this case in her name, we would put her name down. [175]

Q. Does a Carrol Ward show on your slip there?

A. No, sir. We do not keep only the names of either the owner or the driver. The one person, one name.

Q. Oh, Carol Ward didn't tell you then that she was the owner of the car? A. No, sir.

Q. If Mrs. Bennett said that she was driving it?

A. I presume she was driving it. I know that the car was evidently in her name. She was either the driver or the, it was registered in her name.

Q. You usually put the owner's name down rather than who happened to be driving it?

A. We would put the owner's name down if the owner was with the car, but if the owner was not with the car, we would put down the name of the person who had the care of the car.

Q. Then, if Fern Bennett claimed the ownership of that car, she would be the name you would put down?

A. Yes, sir, providing she showed the papers in her name for the vehicle.

Q. That had a Texas license on, did it not?

(Testimony of Silas M. Packard.)

A. Yes, sir, on the Mercury.

Mr. Taylor: I think that's all, Mr. Packard.

Redirect Examination

By Mr. Yeager:

Q. I here hand you Government's Exhibit "D," the original from your records; can you ascertain from those records what time of day they passed through your station? [176]

A. From the time of it, it would be very close to four o'clock. We do not keep the time, but I can tell from when we changed shifts, and I started keeping records, and that was at three, and this wasn't too long after that. It would have been close to four o'clock.

Q. Now, Mr. Packard, what do you ask people passing through there to produce for identification as to ownership of cars?

A. The registration or the state registration or title for the vehicle.

Q. Now, Mr. Packard, I wonder if you would state to the court and the jury whether or not you can identify any of the persons so listed there?

A. I can identify the faces of some of them, I believe. As to which one is which I'm not so sure any more. It has been quite a while ago, and at the time I didn't have any reason for attempting to remember them.

Q. Now, Mr. Packard, I direct your attention to the far end of the counsel table; do either one of those faces look familiar to you? A. Yes, sir.

(Testimony of Silas M. Packard.)

Q. Which one in particular, if any, Mr. Packard?

A. The gentleman with the gray suit there.

The Court: Where is he designating?

Mr. Packard: The gentleman right out in front of me here with the pens in his coat, Mr. Bennett. [177]

The Court: Is that the man?

Mr. Packard: Yes, sir.

The Court: Who do you recognize him as?

Mr. Packard: I believe that is Mr. Bennett.

Mr. Yeager: That's all, Mr. Packard.

Recross-Examination

By Mr. Taylor:

Q. If Mrs. Bennett showed you a Texas title to that car, you would put her down as the owner, would you?

A. If the title was, you mean if the title was in her name, yes, sir.

Q. Irregardless of who was driving it when it arrived at the station?

A. If she was along with the car I would put her name down.

Q. Do you recognize Mrs. Bennett in the court room?

A. Well, I'm not sure that I would now. It has been quite awhile.

Mr. Taylor: Well, we will skip it then. That's all.

(Testimony of Silas M. Packard.)

Redirect Examination

By Mr. Yeager:

Q. Just a moment, Mr. Packard. If they were pointed out to you, do you think you could recognize them?

A. Well, I wouldn't be too sure. Like I say at the time there was no particular reason for attempting to remember them and we were checking in sometimes a couple hundred people a day at that time of year. [178]

Q. It may be possible; is that correct?

A. It might be possible, but I wouldn't be too certain.

Q. Mr. Packard, I direct your attention—— (Interrupted.)

Mr. Taylor: Just a moment, your Honor. I object to any pointing out. We are not going to have the District Attorney testify in this case. If he wants to get five or six people here and line them up and let this man pick them out.

The Court: Objection overruled. You can designate one of them and they can stand up so we can see who you are talking about.

Mr. Yeager: Will the defendant Fern Bennett stand, please.

Q. (By Mr. Yeager): Do you recognize that person?

A. I do. I wouldn't have been too sure, but I also checked them in later in the fall. I remember that.

Q. Miss Crosby stand, please. Would you state

(Testimony of Silas M. Packard.)

whether or not to the court you recognize this woman, Mr. Packard?

A. I am not sure. She looks familiar, but I'm not sure.

Mr. Yeager: Thank you, Mr. Packard.

Mr. Taylor: That's all.

Mr. Yeager: Your Honor, may this witness be released to continue his duties?

Mr. Taylor: No objection. [179]

The Court: Yes, he may be released.

(Witness excused.)

Mr. Yeager: Thank you, your Honor.

The Court: How about, did you put in originals?

Mr. Stevens: Your Honor, we would like to ask Mr. Taylor's stipulation that we substitute this certified copy for the original and have the original returned to Tok.

Mr. Taylor: I have no objection.

The Court: Very well. It may be so substituted.

Mr. Stevens: Mr. Wyman, please.

EARL WYMAN

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Earl Wyman.

Q. And where do you reside, Mr. Wyman?

A. 316 Bryant Street, Fairbanks.

(Testimony of Earl Wyman.)

Q. And do you have a business in Fairbanks, Alaska, Mr. Wyman? A. Yes.

Q. What is that business, please?

A. Photographic business services.

Q. Are you acquainted with, or have you met—strike that, please. Have you met Mr. Harkabus and Mr. Worsham, the FBI agents of [180] Fairbanks?

A. Not formally. I have met FBI agents, but my memory as far as names are concerned, I saw their card, a few of them.

Q. Could you tell us, Mr. Wyman, if during the month of July, 1953, or, well, yes, during the month of July, 1953, you were approached by the FBI to develop certain rolls of film?

A. The date I don't remember, but there was one day approximately I would say in July that two FBI boys came in with some rolls of film, size 127.

Q. And did the FBI agent accompany you and assist you in developing this film?

A. Well, they wanted to know if I wanted to develop this film, if I could. I said yes. I was going to take them. They wouldn't let me. They wouldn't release the film. They wanted to go in the darkroom with me, so both—and as I unwrapped the film one man handed me the film and the other man made sure I received that one roll of film at a time and they saw where I was hanging it and I developed five rolls of film that way.

Q. Did you make any marks on those rolls of film?

(Testimony of Earl Wyman.)

A. Yes. We have identification we put on them so we can separate them.

The Clerk: Government's Identification Nos. 38, 39, 40, 41 and 42. [181]

(Five rolls of developed film were marked Government's Identifications Nos. 38, 39, 40, 41 and 42, respectively.)

Mr. Stevens: Would you like to see these, Mr. Taylor?

Mr. Taylor: What are they?

Mr. Stevens: Rolls of film. Would you like to see them?

Mr. Taylor: Won't do any good. I can't read them.

Q. (By Mr. Stevens): Would you examine the film that is in Government's Identification 38, Mr. Wyman, and tell us if you can identify that film?

A. Yes, I developed this roll.

Q. How can you tell you developed that?

A. It has my punch mark on the end, and I wrote the number one on the back to correspond with the container.

Q. And this is Government's Identification 40, Mr. Wyman?

A. Yes, I developed that roll, too. These are the film that were developed when those men were with me.

Q. Would you do the same thing with Government's Identifications 39, 41 and 42, if you please?

(Testimony of Earl Wyman.)

A. I developed that one, too, No. 41. I developed that one, too, No. 39. [182]

Q. Are there identifying marks on each one of these?

A. Yes, there are punch marks on the end. Make sure we don't get them mixed up. We do that with all our film.

Q. That last one was Government Identification 39?

A. This is No. 42. I developed that one, too. I developed all five of these rolls and they are numbered from one to five. Each roll has a number, 1, 2, 3, 4, 5. That's all the films they had at that time.

Q. When you print a reproduction of these negatives or any negatives, Mr. Wyman, is there any number that you stamp on the back of the photograph, identifying number?

A. Yes, we do. Sometimes if it is a little quick, rush, somebody we know personally, but we usually have them marked by a machine.

Q. Well, this is Government's Identification 17, Mr. Wyman. Does that have a number on it that you can identify?

A. That was printed by my machine. There is my identification number right there.

Q. What is that identification number?

A. TS 733.

Q. And if you printed a series of pictures at that time would the same number appear on all of them?

(Testimony of Earl Wyman.)

A. Well, each roll may have a different number. Number 734, 735, so on, depending on how many rolls there were. That doesn't always take place though, if the man sent in the order as a group they would all have the same number. [183] These would all be in unless we were requested to make different group numbers.

Q. This is Government's Identification 25. Does it have a similar number?

A. That's TS 733. That's my identification number. I think mine is the only machine in town with that number.

Q. Government's Identification 20, does it have the same number also?

A. That's the same number.

Q. Here are a series of identifications, Mr. Wyman. Would you tell me if your identification number appears on all of those so that you could identify them as being printed at the same time?

A. These have all the same numbers. They were all printed by the same enlarger, and I would say at the same time.

Q. And that would be your identification number? A. Yes.

Q. So that these pictures were printed in your business?

A. They were printed by the only enlarger I have that will make marks like that.

Q. I wonder if we could cross-check again one of these rolls of film, Mr. Wyman, and have you say whether or not these negatives produced any

(Testimony of Earl Wyman.)

one of the Government's Identifications. Could you do that?

A. Well, I will have to do a little searching here to find one. [184]

Q. Take Government's Identification 25, for instance. Could you find that on that roll of film?

A. Yes, the second negative from the end here. This print was made from it.

Q. And that is from Government's Identification 42 you have there the negatives?

A. It is roll number 5. I don't know which one it is there.

Q. Government's Identification 42, this picture which is Government's Identification 25 is a print of that negative?

A. The second negative from the end.

Q. I wonder if you would do the same with this, just, this roll of film, please. This is Government's Identification 17?

A. It is a very thin negative. It is number 2 on this roll from all indications. The light is kind of bad on the negative so it is a poor one to make a positive identification, but I am very sure that it is the one.

Q. Try Government's Identification 20 on the same roll there, will you, please. Perhaps you can find it better.

A. Yes, the third one from the end.

Q. So you can positively identify two pictures that are printed here from this roll of film which is Government's Identification 41?

A. Yes.

(Testimony of Earl Wyman.)

Q. Well then, Mr. Wyman, would you tell the court [185] whether or not these prints are made from the same rolls of film that you developed with the FBI?

A. These prints and that other one I examined were made from the two rolls that I developed for the FBI.

Q. And all of these have the same numbers?

A. They all have the same identification, yes.

Q. Which would show that you or your business printed them all at the same time?

A. Yes. I developed the film myself, but I don't recall if I printed those or whether somebody working for me printed those.

Mr. Stevens: Mr. Taylor, would you care to stipulate that those pictures were all printed by that, or would you like for me to go through one by one?

Mr. Taylor: I have no objection that they were printed, but I am certainly not going to admit them in evidence. I will admit that the witness would testify that the prints were made from those negatives. I have no doubt about that.

Mr. Stevens: Very well. That's all I'm asking at this time. Your witness then, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. Wyman, how long did it take you to print these films?

A. To print the prints? [186]

(Testimony of Earl Wyman.)

Q. To make the positives from your negatives?

A. Oh, ordinarily it takes about, depends on how big a rush. We could make them in an hour, an hour and a half.

Q. Now in this particular instance when you took these films and took them into the dark room with these two FBI men?

A. I didn't take the films for printing purposes. I took them for developing the film.

Q. You developed the film in there. What happened to the film then?

A. The FBI men, I turned it over to them.

Q. Did you print these?

A. I don't recall printing them myself. They were printed in our place. I may have done it.

Q. Now, when they left your place, did they have notations on the back of them?

A. Ordinarily, not in our writing. We didn't write that.

Q. You didn't write it. You notice some letters printed on there. Did you or your staff do that?

A. Do you mean these?

Q. No, on the front?

A. Oh, on the front there on the pictures. I don't know who put that on. I didn't. These either.

Q. And a number, quite a large number of these have different letters, "s," "h," "C," "d," and so forth. Would you say that they were not put on by your studio? [187]

A. They were not put on by me, and I don't believe anybody in the studio put them on.

(Testimony of Earl Wyman.)

Q. So they have been tampered with after they left the studio then, is that right?

A. Those letters were placed on there after they left the studio.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. What size film is that, Mr. Wyman?

A. 127.

Q. And what type of camera would that fit into?

A. Quite a few. It is hard to say.

The Clerk: Government's Identification No. 43.

(Small Brownie camera was marked Government's Identification No. 43.)

Mr. Stevens: May we have the recess, your Honor?

The Court: Yes.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:55 p.m., the court took a recess until 4:05 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. [188]

The Court: Very well, proceed.

EARL WYMAN

the witness on the stand at the time the recess was taken, resumed the stand for further

Redirect Examination

By Mr. Stevens:

Q. Mr. Wyman, how long have you been in the photography business?

A. Well, since about 1931.

Q. And have you had experience since that time in developing film? A. Quite a bit.

Q. And is that part of your business that you run here in Fairbanks, the development of film?

A. Yes.

Q. And have you had sufficient experience, Mr. Wyman, to be able to tell the size of a roll of film even though it is not printed on there?

A. I think so.

Q. Well, based upon that experience, Mr. Wyman then, will you tell us again what size this film is that is before the court?

A. That's 127, all five of them.

Q. Mr. Wyman, this is Government's Identification 43, a camera. Would you examine that camera, Mr. Wyman, and tell us if you can what size film would be used in that camera?

A. That is a Kodak special, Brownie Special. 127 film is all it will take. [189]

Q. And that camera could only take the size film which is before the court then?

A. That's the regular commercial 127. That's all it is built for. It is written right inside on there.

(Testimony of Earl Wyman.)

Mr. Stevens: Thank you very much, Mr. Wyman. Your witness, Mr. Taylor.

Recross-Examination

By Mr. Taylor:

Q. Mr. Wyman, with the normal development of those films, what size is the picture?

A. With the normal development?

Q. Yeah, would they be the size of the frame on the film?

A. No, there is two different ways of printing that. They make a contact print then it would be the same size as the film, but some people request either what they call a jumbo or a plain enlargement, and that can be blown up any size you want.

Q. That is blown up from it?

A. From the original negative.

Q. So that is not the first negative that is taken off, or the first positive?

A. I wouldn't say that. There would have been one or two before or after. You can't tell.

Q. So they have to be, these pictures have to be enlarged to get that size of photograph off of the small film, is that right? [190]

A. Yes, that's projected up a little bit.

Q. Is there any distortion in blowing up pictures?

A. Well, if you want to take a micrometer there is distortion. All lenses have a distortion pattern. It is very slight, but you have to measure it with micrometers to tell it.

(Testimony of Earl Wyman.)

Q. Unless you blow it up to normal size?

A. Oh, yes, you can see it then.

Q. Then there would be a distinct distortion in the picture?

A. Oh, yes, if they are real large.

Q. Did the FBI get these pictures back from you, Mr. Wyman?

A. I don't recall if they brought them in. If they brought them in, chances are they got them back. I know when they brought the film in they were in my presence all the time, and they made sure they got it back.

Q. Who would develop them though?

A. The prints?

Q. Yeah?

A. Now I have had people working for me do the printing for me.

Q. Would the FBI stay there while they were developing those?

A. They might have. They may have stayed there, and they may not have. I don't know. [191]

Q. Was there any way to tell that those have been printed in your establishment?

A. Oh, yes. They have my mark on the back. I don't think there is another machine in the country that has that type of marking.

Mr. Taylor: That's all, Mr. Wyman.

Mr. Stevens: Now, again, Mr. Taylor, for the record you stipulated that the prints which appear here are prints of the negatives which are before the court?

(Testimony of Earl Wyman.)

Mr. Taylor: I will stipulate that this witness testifies to that effect. We will take his testimony to be that.

Mr. Stevens: Then amending the stipulation, will you say that these prints that are before the court are such that Mr. Wyman would testify that the prints were made from the negatives which are before the court?

Mr. Taylor: Yes, I would stipulate to that.

Redirect Examination

By Mr. Stevens:

Q. And, Mr. Wyman, I ask you and in your opinion and based upon your experience, are those prints a fair representation of the negatives which are before the court?

A. Those that I examined are.

Q. And would you examine the pictures in general, all of the exhibits, and see if you could find any that is not, appears to be distorted or in any way altered. [192]

A. As far as the alteration of the latent image, or the image that is on the picture, any that I have seen have not been altered.

Mr. Taylor: You mean there is not sufficient distortion on any of them, Mr. Wyman, that would be noticeable?

Mr. Wyman: I haven't seen any.

Mr. Taylor: I will stipulate that there is no distortion on the pictures.

(Testimony of Earl Wyman.)

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: No further questions.

Mr. Wyman: The only thing I see on here is some ink. I would no doubt——

Mr. Taylor: That the ink marks that I called your attention to, Mr. Wyman?

Mr. Wyman: Yes.

Mr. Stevens: Thank you very much, Mr. Wyman. You wish to be excused, do you not, to go to Anchorage?

Mr. Taylor: No objection.

(Witness excused.)

Mr. Stevens: Mr. Hudson, please.

HOWARD K. HUDSON

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please. [193]

A. Howard K. Hudson.

Q. And you are in the service, Mr. Hudson?

A. Right.

Q. Were you stationed in or near the town of Fairbanks, Alaska, in June of 1953 as a member of the armed forces? A. Yes.

Q. Where were you stationed?

A. Eielson Air Force Base.

Q. Will you tell us whether or not you know a

(Testimony of Howard K. Hudson.)

girl named Marilyn Jean Casey? A. Yes.

Q. Where did you meet Miss Casey?

A. Southside Bar.

Q. Do you remember when you met here?

A. The last part of June or the first of July,
one of the two.

Q. Of 1953? A. Right.

Q. Do you know whether or not she had a car
at that time or she was using a car at that time?

A. She was using a '53 Buick.

Q. And you state that you met her at the South-
side Bar, Mr. Hudson? A. Yes.

Q. And was there anyone with her at that time?

A. No, I don't think so. [194]

Q. Do you remember approximately what time
it was in the day that you met her?

A. It was along late in the evening.

Q. Did you have—strike that, please. Did you
go anywhere with Miss Casey? A. Yes.

Q. Where did you go?

A. Trail's End Motel, I think it was.

Q. What type of a place was that?

A. Just one of those places.

Q. Well, was it a house or a Quonset Hut or
what type? A. It was just a cabin.

Q. And where is that located?

A. Out here on Cushman.

Q. And did you engage in any type of an act
with her, Mr. Hudson? A. Yes.

Q. What type of act was that?

(Testimony of Howard K. Hudson.)

A. Sexual relation.

Q. And did you pay her anything for that act of sexual relations? A. Sure did.

Q. What did you pay her?

A. Fifteen bucks.

Q. Did you see Miss Casey after that at all in Fairbanks? [195]

A. I have seen her around, yeah.

Q. And where did you see her?

A. Oh, different places, mostly around the South Side.

Q. Could you tell us whether or not you ever saw her at the Squadron Club? A. Yes.

Q. Do you remember when that was, Mr. Hudson?

A. It was along the last part of July, the middle of July.

Q. And did you see her at the place you met her originally after the first time?

A. I have seen her in there, yeah.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Who was with Miss Casey at the time that you met her? A. She was by herself.

Q. What? A. She was all by herself.

Q. And that was you say the Southside Bar?

A. Right.

Q. And did you start a conversation with her?

A. In a round-about way I guess.

(Testimony of Howard K. Hudson.)

Q. Have a few drinks with her?

A. No. [196]

Q. No drinks? A. No.

Q. And you know whereabouts on Cushman Street that this place that you went with her?

A. It is one of the cabins, Trail's End Motel. I don't know just the number of it.

Q. And how close can you set the date that you went there with her?

A. Well, I will say it was around the 2nd of July.

Q. Could have been the 3rd?

A. I don't believe so.

Q. Was you with Marilyn Casey the night that she was arrested?

A. I seen her the first part of the night, yeah.

Q. What?

A. I seen her the first part of the night, of the 3rd.

Q. You think, you believe it was the 2nd of July then that you went to Marilyn Jean Casey's cabin? A. Yeah.

Q. Anybody else there at the time you went to the cabin? A. No.

Q. What did she do with the money the time she got it? A. Beats me.

Q. That the only time you was with Miss Casey?

A. Yeah. [197]

Q. Where are you stationed now?

A. Andrews, D. C.

Q. What?

(Testimony of Howard K. Hudson.)

A. Andrews Air Force Base, D. C.

Q. Oh, Washington, D. C.? A. Yeah.

Q. You subpoenaed to come up here to testify?

A. Must have been.

Q. That's how you happened to be here?

A. Yeah.

Q. How did you come, Army transportation or Air Corps transportation?

A. Military air line.

Q. When did you leave Washington?

A. The 4th.

Q. Do you know Mr. Bennett?

A. No, I never did know him.

Q. You know Mr. Kehert? A. No.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. Mr. Hudson, did you notice the license plate on the car that Miss Casey was driving the night that you went with her?

A. Indiana, I think it was. [198]

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: That's all.

Mr. Stevens: Thank you, Mr. Hudson.

(Witness excused.)

Mr. Stevens: Your Honor, may we ask for an adjournment at this time. The next government witness has not arrived as yet.

The Court: Any objection, Mr. Taylor?

Mr. Taylor: Sir?

The Court: I say is there any objection to a recess at this time?

Mr. Taylor: Well, if he has some other witness, I would like to get this thing over with. It is dragging pretty slow.

The Court: Do you have any witnesses you can use.

Mr. Stevens: Your Honor, I have two witnesses who are coming in and then two FBI agents, but as a matter of proof I would prefer not to produce the FBI agents at this time.

The Court: I will require you to proceed.

Mr. Stevens: Call Mr. Worsham.

JOHN W. WORSHAM

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens: [199]

Q. Will you state your name, please?

A. John W. Worsham.

Q. What is your occupation, Mr. Worsham?

A. Special Agent, Federal Bureau of Investigation.

Q. And where is your duty station?

A. Fairbanks, Alaska.

Q. Were you stationed here in June of 1953?

A. I was.

The Clerk: Government's Identification No. 44.

(Testimony of John W. Worsham.)

(Envelope containing twenty (20) receipts for the purchase of gasoline was marked Government's Identification No. 44.)

By Mr. Stevens:

Q. Mr. Worsham, do you know a girl named Marilyn Jean Casey? A. I do.

Q. Did you have occasion to see her in July of 1953? A. I did.

Q. In Fairbanks, Alaska? A. I did.

Q. And where did you first see her?

A. I saw Miss Casey first in the United States Attorney's Office.

Q. And do you remember the date?

A. July the 6th, 1953.

Q. Mr. Worsham, this is Government's Identification 30; are you familiar with that identification? [200] A. I am.

Q. Could you tell us whether or not you have seen it before? A. I have.

Q. Could you tell us whether or not your name appears on that?

A. It does. It appears on the last page and on the first page typewritten. My signature on the last page.

Q. Are you then a witness to that document?

A. I am.

Q. Would you tell the court and the jury how that document was prepared, Mr. Worsham?

A. How it was prepared?

(Testimony of John W. Worsham.)

Q. Yes.

A. This document was prepared by, after an interview with Miss Casey in the FBI office which is Room 203 on the second floor of this building.

Q. And was Miss Casey present at that time?

A. She was.

Q. Who typed the document?

A. Mrs. Chesser of the Marshal's office, if I remember correctly.

Q. Mr. Worsham, did you suggest to Miss Casey the contents of that document?

A. No, I did not.

Q. Did any person in your presence suggest to her the contents of that document? [201]

A. No, I do not remember if anyone did or not. I don't think that anyone did. This statement was made by Miss Casey, part of it was dictated to my knowledge by her, and part of it by Mr. Harkabus, Special Agent Harkabus at that time.

Q. And were you present when Mr. Harkabus dictated the portion which he prepared?

A. I was.

Q. And where did he get the information?

A. From Miss Casey.

Q. Mr. Worsham, did you make any threats or promises to Miss Casey in order to secure that statement? A. No, sir, I did not.

Q. To your knowledge, did any other person make any threat or promise to Miss Casey to secure that?

(Testimony of John W. Worsham.)

A. No, sir, not in my presence or any other time that I know of.

Q. What was the occasion of having that statement prepared, Mr. Worsham?

A. Well, for a complete account of what Miss Casey had told us, the allegations she had made against the individuals.

Q. Did you know who those individuals were?

A. At the time?

Q. Yes.

A. I had never seen—at this time I had seen Norma [202] Ruth Crosby who is mentioned in the statement, and I had also seen Miss Ward prior to the statement.

Q. But you were not acquainted with Mr. Bennett, the defendant in this action? A. No, sir.

Q. And did you know Mr. Kehert, the defendant in this action, at that time? A. No, sir.

Q. Who supplied the names of the individuals named in that Indictment, in that statement?

A. Miss Casey.

Q. This is Government's Identification 31——

Mr. Stevens: And, your Honor, at this time, this affidavit is the original of Government's Identification 31. I would like to strike that and put this in as Government's Identification 31.

The Court: Very well.

Q. (By Mr. Stevens): Are you familiar with Government's Identification 31, Mr. Worsham?

A. I have seen this before.

Q. Where did you see that, Mr. Worsham?

(Testimony of John W. Worsham.)

A. Agent Harkabus showed it to me.

Q. And do you know how that was prepared?

A. How it was prepared?

Q. Yes. [203]

A. I wasn't present at the time this was prepared.

Q. Do you know of your own knowledge who prepared it? A. I do not know who typed it.

Q. Do you know who dictated the material contained in the affidavit?

A. It wasn't in my presence.

Q. But this other, Government's Identification 30, was prepared in your presence?

A. Yes, it was.

Q. Would you tell us whether or not the initials M.J.C. that are on there were put on there in her presence?

A. I observed Miss Casey placing her initials, M.J.C.

Q. Did you observe her read that document?

A. I did.

Q. Did you explain to Miss Casey, or did someone explain to her in your presence the import of that document, Mr. Worsham? A. We did.

Q. Mr. Worsham, this is Government's Identification 43; would you tell us where that, what that is, please? A. A baby Brownie camera.

Q. And have you seen that before?

A. I have.

Q. Where did you first see that, sir?

(Testimony of John W. Worsham.)

A. I first saw it in Room Number 4 of the Transient Rooms. [204]

Q. And do you know of your own knowledge who was staying in that room at the time?

A. Well, Mr. Kehert was in the room at the time that I saw this.

Q. Did you take possession of the camera when you saw it? A. Yes.

Q. Do you know what date that was?

A. Yes, sir. It was July the 6th, 1953.

Q. And who was with you at that time?

A. Agent Harkabus of the FBI, Deputy Marshal, or Acting Marshal Theodore McRoberts, and Mr. T. N. Gore, Assistant United States Attorney.

Q. And when you found that, Government's Identification 43, for what purpose were you in Mr. Kehert's room? A. For his arrest.

Q. And did you arrest Mr. Kehert at that time?

A. Agent Harkabus read the warrant to Mr. Kehert.

Q. And how did you obtain that camera?

A. A search incidental to an arrest.

Q. And did you take possession of it at that time? A. Yes, sir.

Q. Were there any other items along with that camera?

A. There were five rolls of exposed film.

Q. Did you take possession of those rolls of film, too? [205] A. Yes, sir, at that time.

Q. These are Government's Identification 38 through 42, I believe. Would you tell us whether or not you have seen those before, Mr. Worsham?

(Testimony of John W. Worsham.)

A. I have.

Q. Where did you see those?

A. When I saw the film they were in, on a spool at the time, not like this, that fits into this camera.

Q. What did you do with the film when you got it?

A. We took it down to Mr. Wyman to have it developed.

Q. And did you observe the film being developed?

A. I was in the dark room at the time.

Q. And were there any identifying marks put on the film at that time, Mr. Worsham?

A. To my knowledge there was, but I didn't put it on.

Q. Who put the marks on there?

A. Agent Harkabus.

Q. And are all five of those rolls of film included in your testimony as to the place where you found them, Mr. Worsham?

A. Yes, sir.

Q. Mr. Worsham, this is a series of pictures marked for identification that have writing on the back, and some have writing on the front. Would you take them individually and tell us if you know who put the writing on the back? Did you put any of the writing on yourself, Mr. Worsham? [206]

A. Not to my knowledge. I would have to examine them all prior to making that statement. I did not.

(Testimony of John W. Worsham.)

Q. Have you seen those pictures before, Mr. Worsham? A. I have.

Q. Where did you see those pictures before?

A. I saw these pictures after they were developed, at Mr. Wyman's, of the prints made of this film.

Q. Was Miss Casey ever shown those films in your presence? A. She was.

Q. Do you know who owned the camera which is Government's Identification 43?

A. Miss Casey told us she owned it. I don't know who owns it.

Q. And the film, the rolls of film, do you know who owned those?

A. She told us that she owned the film also.

Q. Mr. Worsham, this is Government's Identification 44 which has twenty coupon receipts, and Government's Identifications 35 and 36. Will you tell us whether or not you can identify those?

A. I can.

Q. Where did you first see those, Mr. Worsham?

A. In room 404 of the Fifth Avenue Annex Hotel.

Q. Here in Fairbanks, Alaska?

A. Right. [207]

Q. And what were you doing in that room?

A. Arrest Mr. Bennett.

Q. And by Mr. Bennett, do you mean the defendant in this action?

A. Mrs. James J. Bennett.

(Testimony of John W. Worsham.)

Q. And where in particular did you find those coupons?

A. When I first saw the coupons they were being handled by Agent Harkabus.

Q. Do you know of your own knowledge where they came from, Mr. Worsham?

A. Of my own knowledge, I think they came from Mr. Bennett's wallet.

Q. And was Mr. Bennett under arrest at the time? A. He was.

Q. Now, Mr. Worsham, when you went into Mr. Kehert's room, did you and Agent Harkabus identify yourselves as agents of the Federal Bureau of Investigation? A. We did.

Q. And did you identify yourselves in a similar manner to Mr. Bennett when you went to his room?

A. We did.

Q. On what date did you go to Mr. Bennett's room? A. July the 6th, 1953.

Q. Now, the two Government Exhibits which are separate parts of the same—strike that, would you, please. Did you see those two, Government's Exhibits 35 and 36 at the same time you saw the others originally? [208] A. 35 and 36?

Q. Right on top, Mr. Worsham.

A. At the time that I saw these gas coupons there were twenty-two of them at that time, I saw twenty-two.

Q. How many are in the one identification? That is Government's Identification 44; how many are there? A. I counted twenty-two.

(Testimony of John W. Worsham.)

Q. And that is counting the two which are separate identifications? A. Yes.

Q. Is that the number you saw the first time you saw these coupons?

A. The first time I counted them that is how many I saw.

Q. The first time you counted them?

A. Right.

Q. Was there anyone with Mr. Kehert at the time you went to his room? A. No, sir.

Q. Did you have a conversation with him at that time?

A. I did not, other than identifying myself and Agent Harkabus arrested him.

Q. Was there anyone with Mr. Bennett when you arrested him?

A. When I entered the room Acting United States Marshal Theodore McRoberts was in the room. [209]

Q. And at that time did you have any conversation with Mr. Bennett? A. I did not.

Q. Mr. Worsham, did you go to see Miss Casey at a private home in South Fairbanks in the company of Mr. Sullivan and Mr. Harkabus at any time?

A. I went to see Miss Casey with Agent Harkabus at the home of Ed Gines.

Q. And do you remember when that was?

A. The exact time I couldn't recall.

Q. Well, at that time, Mr. Harkabus, did you threaten Miss Casey and tell her that she would

(Testimony of John W. Worsham.)

have to tell the story which she told the first time she told you the story of these facts?

A. No, sir, I have never threatened anyone in order to obtain a statement or anything else.

Q. Well, did Mr. Harkabus threaten her at that time? A. No, sir.

Q. And when you originally obtained this statement from Miss Casey did you tell her that if she gave a statement to you as a member of the FBI you would see that the charges would be dropped against her? A. No, sir.

Q. Did you know that there was a case pending against her at that time? [210]

A. I knew that she had been arrested for operating a bawdy house. Mr. McRoberts told me that.

Q. Mr. Worsham, did you participate in the Federal Bureau of Investigation's investigation in this case? A. I did.

Q. Do you know Mr. Kenneth Hudson?

A. I do.

Q. When did you meet him?

A. When I interviewed him at Eielson Air Force Base.

Q. Do you remember what time of the year that was, and what year it was?

A. It was 19 and 53. The exact date I do not recall this time.

Q. And how did you happen to locate Mr. Hudson?

A. Miss Casey had told me that she had turned

(Testimony of John W. Worsham.)

a trick with Mr. Hudson while working as a prostitute in Fairbanks, Alaska.

The Clerk: Government's Identification 45.

(Post card bearing picture of Royal Motel was marked Government's Identification No. 45.)

Q. (By Mr. Stevens): Mr. Worsham, this is Government's Identification 45. Would you tell us what that is, please?

A. It is a post card with a picture of Royal Motel, Denver's Finest, 595 South Broadway, Denver, Colorado, is on the front of it. [211]

Q. And where did you find that?

A. That was found in the room of Mr. Kehert.

Q. And when was that found?

A. On July the 6th, 1953.

Q. And was that found at the same time you have described before when you were in the room of Mr. Kehert for the purpose of making an arrest?

A. Yes, sir, it was. I was never in Mr. Kehert's room but one time.

Q. And where did you find that, or did you find that, Mr. Worsham?

A. I didn't find this. I saw it. Agent Harkabus found this post card.

Q. Are your initials on that post card?

A. Yes, sir.

Q. And when did you put them on there?

A. On July the 6th, 19 and 53.

Mr. Stevens: Your Honor, at this time may we now adjourn?

(Testimony of John W. Worsham.)

The Court: Yes. In a moment, ladies and gentlemen of the jury, we will take an adjournment until tomorrow morning. In the meantime, remember not to talk about the case or the parties or permit anyone to talk about them within your hearing. Keep your minds perfectly free from an opinion as to the guilt or innocence of these defendants until the case is finally submitted to you. Make the adjournment. [212]

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5 o'clock p.m., the trial of this cause was adjourned until May 12, 1954, at 10 a.m.)

Be It Remembered, that upon the 12th day of May, 1954, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendants both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Stevens: The Government is ready, your Honor.

Mr. Taylor: Defendants are ready.

The Court: Very well. Call your witness.

JOHN W. WORSHAM

the witness on the stand at the time of the adjournment, resumed the stand for further direct examination:

The Clerk: Government's Identification No. 46.

(Paper bag with the name Fashion Bar, Colorado, was marked Government's Identification No. 46.) [213]

By Mr. Stevens:

Q. Mr. Worsham, this is Government's Identification 46. Will you tell us what this is, please?

A. It is a shopping bag from the Fashion Bar, Denver.

Q. Where did you first see that, Mr. Worsham?

A. I first saw this at room No. 4 of the Transient Rooms, the room that Mr. Kehert was arrested in.

Q. And where exactly was it in the room?

A. It was on a chest of drawers on the right side of the room as I entered the room.

Q. Was there anything in the bag?

A. There was a camera, a Brownie camera, film, also the post card of the Royal Motel.

Q. And is Government's Identification 43 the camera which was in the bag which is Government's Identification 46? A. May I see it. It is.

Q. And is this Government's Identification 45 the card which was in the bag? A. It is.

Q. And were these four rolls of film, Government's Identification 38 through 41?

(Testimony of John W. Worsham.)

A. That's the film that was on the spools, exposed prior to being developed.

Q. Now, how did you know where to locate that bag?

A. Prior to going to the Transient Rooms for the arrest of Mr. Kehert, Mr. Harkabus and Miss Casey had told us these articles were there, and they were hers. [214]

Q. And they were all together?

A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Now, Mr. Worsham, you said that this shopping bag was from Denver?

A. It is on the face of the shopping bag, Denver.

Q. Now, how do you know that that is from Denver?

A. Miss Casey told us it was.

Q. Could that be from Aurora or Greeley?

A. Possibly could. Those name are on it.

Q. And she told you when you was talking to her in the jail here that the shopping bag was out there?

A. When I was talking to her in the FBI office, Room 203 of this building.

Q. On the 6th day of July?

A. July, 1953.

Q. And, now isn't it a fact that you claimed at a preliminary hearing that these pictures belonged to Mr. Kehert?

A. I did not testify at a preliminary hearing.

(Testimony of John W. Worsham.)

Q. You did not testify? A. No, sir.

Q. I believe Mr. Harkabus testified then, did he not? A. He did, to my knowledge. [215]

Q. Now, if Miss Casey testified on the stand here that you took these things without her permission, in fact she testified that they were stolen, would you say that was an error on her part?

A. I know that she told us these articles were there, they were her property and she said it would corroborate her statement to us.

Q. Now, where was this?

A. It was on a chest of drawers on the right-hand side of room number 4 of the Transient Rooms as you enter the door.

Q. Right in plain sight, was it not?

A. It was up on top of the chest of drawers.

Q. And you took this picture, or took this camera and these rolls of film and then you had them developed, is that right? A. Yes, sir.

Q. Miss Casey's permission?

Q. She told us we could have them, told us they were her property.

Q. Was there anything in this statement here, Mr. Worsham, about that camera and films that you could have them?

A. Not to my knowledge. There is nothing in here that we could have them, no, sir. [216]

Q. Now, that is important enough to be admitted in evidence here, these pictures; wasn't it important enough to be put into this statement? How did you happen to leave that out?

(Testimony of John W. Worsham.)

A. Well, we did leave it out.

Q. You did leave it our purposely?

A. No, sir, not purposely.

Q. Now, did you make any of the markings on the film, Mr. Worsham? A. No, I did not.

Q. Who did? A. Mr. Harkabus.

Q. And what kind of markings did he make?

A. Well, it was dark in the room. I couldn't see. I observed him since he punched holes on the end of roll of film.

Q. He was in there in the dark making markings on the film?

A. Yes, sir, he was in my presence and Mr. Wyman's.

Q. Did you see him making the markings?

A. No, sir, I did not.

Q. Now, coming back to that statement, Mr. Worsham, you said that you helped prepare that statement?

A. I helped with the interrogation of Miss Casey.

Q. Now, just how do you interrogate; do you say would you like if you are questioning somebody you say, now you [217] just tell me all about that, or do you say, isn't it a fact that such and such happened?

A. We ask an individual when we are questioning him we apprise them that they do not have to talk to us, and we always apprise them that they are not forced or under duress, promises or rewards made to them in order for them to talk to us.

Q. And isn't it a fact that sometimes that you

(Testimony of John W. Worsham.)

tell them, well, now, if you will cooperate you won't be in trouble? A. No, sir.

Q. What? A. I do not.

Q. You don't? A. No, sir.

Q. You tell Miss Casey she was entitled to an attorney to be present?

A. I think Mr. Harkabus did.

Q. What you didn't think of Mr. Harkabus thought of; is that right?

A. No, I wouldn't say that either.

Q. Sometimes neither one of you think about it, is that right? A. Sir?

Q. Sometimes neither one of you would think about it?

A. Well, in a case of that nature, I think if one of [218] us advises her in the presence of two people interviewing her, I don't see any necessity of repeating the statement.

Q. How many were present when you were questioning her?

A. Taking the statement Mr. Harkabus and myself and Miss Chesser, sir.

Q. You would ask questions and Mr. Harkabus would ask questions?

A. At the time that statement was taken Mr. Harkabus and Miss Casey dictated it.

Q. Miss Casey dictated it out just the way it was? A. Part of it, and Mr. Harkabus.

Q. Mr. Harkabus, and I believe you said you dictated part of it?

A. Did I say I helped prepare it?

(Testimony of John W. Worsham.)

Q. That's what you said, did you not?

A. When I was there I asked questions during the time the statement was being prepared.

Q. Now the preparation, you mean that while it was being prepared, actually typewritten, putting the words down, on that paper?

A. No, sir. Mrs. Chesser took it in shorthand.

Q. Well, what did you do in preparing it then?

A. Well the statement was prepared, being typed.

Q. And you put some of the words down that Mrs. Chesser were to type, is that right?

A. I might have commented on some [219] phraseology.

Q. Now you must have because Miss Casey, if she testified there is words in there that she didn't even know the meaning of, who supplied those?

A. Miss Casey read that statement and was asked if there was anything in it that she didn't understand to advise us and initialed each page and signed the statement.

Q. Now, after Miss Casey signed this statement, who had her released from custody, you or Mr. Harkabus?

A. Neither one of us.

Q. Who released her?

A. I do not know.

Q. You knew she was being held under a charge, did you not?

A. Not a Federal charge on which the FBI has jurisdiction.

Q. You know that she was in jail at the time you talked to her?

A. Yes, sir, I do.

(Testimony of John W. Worsham.)

Q. And then subsequent to signing this paper she was released, wasn't she?

A. To my knowledge, I heard that she was.

Q. To your knowledge. Isn't it a fact, didn't you tell her to come back the next day and sign another statement?

A. No, sir.

Q. What?

A. I did not. [220]

Q. Now, Mr. Worsham, will you tell me then how she happened to come back two days later and sign this one before you? She just come walking down there?

A. I testified yesterday, Mr. Warren Taylor, that Miss Casey, this statement was prepared in the presence of Mr. Harkabus. I think I was present at the time that it was signed before Mrs. Nordale. That's the time that I saw the statement.

Q. Were you present when Marilyn Casey signed that?

A. Yes, sir, I was in the Commissioner's office.

Q. And who was it used the words there that Miss Casey did not know the meaning of, you or Mr. Harkabus?

A. It must have been Mr. Harkabus if she did not know the meaning of it.

Q. Do you know what Miss Casey was in jail for?

A. I think it was vagrancy. I couldn't say for sure.

Q. Do you know when she was arrested?

A. I couldn't say positively, no, sir.

(Testimony of John W. Worsham.)

Q. Now, you say that you went to the Transient Rooms; when you went there did you have a Warrant for the arrest of Mr. Kehert?

A. Mr. Harkabus had a Warrant for Mr. Kehert's arrest in his pocket.

Q. Did you have that Warrant when you left the Federal Building to go out there?

A. Yes, sir, Mr. Harkabus had it. [221]

Q. Who got that Warrant?

A. Who received the Warrant?

Q. Yes, who was the one that procured the Warrant? A. Mr. Harkabus filed a Complaint.

Q. Now, did Mr. Harkabus make an application for a Search Warrant?

Mr. Stevens: I object, your Honor. The question of the search has been fully argued before this court, and I do not think it should be gone into again.

The Court: Objection sustained.

Q. (By Mr. Taylor): You had no Search Warrant then?

Mr. Stevens: I object again, your Honor.

The Court: You object to that because it is contrary to the facts?

Mr. Stevens: No, sir, it is not contrary to the facts. I do not wish him to go into the same thing again. I am objecting to the fact that Mr. Taylor is attempting to go around your Honor's ruling in that regard, in regard to my prior objection that the question of the validity of this search and seizure has already been settled before this court.

(Testimony of John W. Worsham.)

If he just wants to ask the man if he's got a Search Warrant that's all right, but I believe he is attempting to go around your Honor's ruling. I do not wish to go into this question of the search and seizure again. We have argued it fully. I will withdraw my objection to the last question and just see what happens. [222]

The Court: Very well. Proceed, Mr. Taylor.

A. We did not have a Search Warrant.

Q. (By Mr. Taylor): Did you have an opportunity to get one before you went to that, to the Transient Rooms?

A. We could have, I imagine, because we knew that this camera, post card, shopping bag and what not was there and the property of Miss Casey.

Q. Now, what did you do when you went to Mr. Kehert's room? A. What did I do?

Q. Yeah. A. Well, the door was open.

Q. Who opened the door? A. Mr. Kehert.

Q. And then what followed?

A. Pertaining to me, sir?

Q. You and Mr. Harkabus and Mr. Kehert?

A. When the door was opened Mr. Harkabus drew his gun and we walked inside.

Q. What did he do with the gun?

A. Mr. Harkabus?

Q. Yeah.

A. He put it back in the holster. We put Mr. Kehert against the wall, searched him for weapons and handcuffed him. [223]

(Testimony of John W. Worsham.)

Q While you were searching what was Mr. Harkabus doing with this gun?

A. It was in his holster. After we got him against the wall I did not see the gun again.

Q. He had it in his hand when he went in?

A. Not when he went in. Mr. Kehert opened the door. Mr. Harkabus drew his gun to cover. We asked Mr. Kehert, and we put him against the wall, and I didn't observe Mr. Harkabus with the gun any more.

Q. Did you handcuff Mr. Kehert?

A. We did.

Q. Had he offered any resistance?

A. He did not.

Q. What was the purpose of handcuffing him then? A. He was a prisoner.

Q. Do you handcuff a prisoner that you are arresting upon suspicion?

Mr. Stevens: I object to that, your Honor. We have already stated we had a Warrant for his arrest. There is no ground for Mr. Taylor's question that he was arrested on suspicion. My objection was Mr. Taylor has already brought out himself that the FBI agents had a Warrant for Mr. Kehert's arrest and there was no arrest upon suspicion.

The Court: Well, this is about a handcuffing.

Mr. Stevens: It was a question of whether or not he handcuffs a person when he arrests him on suspicion. They [224] arrested him on a Warrant, your Honor, not suspicion.

The Court: Objection sustained.

(Testimony of John W. Worsham.)

Q. (By Mr. Taylor): Well, now, what is the procedure, your customary procedure if you are arresting a person on suspicion; do you handcuff?

A. I never arrested a person on suspicion.

Q. Do you ever arrest a person on suspicion?

A. No, sir, when we arrest there is a Warrant outstanding.

Q. But when you search you don't always have a Search Warrant?

A. To search a place we don't always have a Search Warrant?

Q. Yeah.

A. When we search places incident to arrest and when we have a Search Warrant.

Q. Now, what else did you take from room 4 in the Transient Rooms?

A. That's all that I took to my knowledge.

Q. Camera?

A. Camera, post card, shopping bag, and film.

Q. And at the time that you went out, left town, you knew then that the shopping bag and the film and the camera was in Mr. Kehert's room, did you not?

A. Yes, sir, I did. Miss Casey had told me that, Mr. Harkabus and myself. [225]

Q. But knowing that these things were there you failed to get a Search Warrant, is that right?

A. We did not get a Search Warrant.

Q. And knowing those articles were there. Well, now, when did you first see Mr. Bennett?

(Testimony of John W. Worsham.)

A. I first saw Mr. Bennett in Room 404 of the Fifth Avenue Annex Hotel.

Q. And when was that?

A. That was on July 6th, 1953.

Q. July the 6th, what time of the day?

A. About five o'clock.

Q. In the afternoon? A. Yes, sir.

Q. And how did you happen to go there?

A. Mr. Harkabus had in his possession a Warrant for Mr. Bennett's arrest.

Q. And where did you first go after you got that Warrant? A. Where did we first go?

Q. Yeah.

A. Directly to—I was in the FBI office when Mr. Harkabus obtained the Warrant. He come by. I went with him to the Fifth Avenue Hotel Annex, Room 404.

Q. And did you know that at the time you got the Warrant that Mr. Bennett was under arrest then by Mr. McRoberts?

A. No, sir, I did not. [226]

Q. And did you know that either at your instigation or the instigation of Mr. Harkabus the booking of Mr. Bennett was interrupted and he was taken back to the Fifth Avenue Hotel?

A. I have no knowledge of that.

Q. Well, you have the knowledge that Mr. McRoberts—Deputy Marshal McRoberts—was in the room with Mr. Bennett at the time that you got there? A. He was.

(Testimony of John W. Worsham.)

Q. That he had him a prisoner and under guard at that time? A. I did not know that.

Q. You did not know it? A. No, sir.

Q. What would the Deputy Marshal be there at that time for then?

A. You would have to ask him. I couldn't say.

Q. And at that time that you got your Warrant for his arrest did you get a Search Warrant for his room?

A. No, sir, I did not. I didn't get the Warrant for his arrest.

Q. And were you not advised by Mr. McRoberts that he was taking Mr. Bennett back to his room?

A. I was not.

Q. Was Mr. Harkabus advised?

A. I do not know. [227]

Q. Mr. Harkabus didn't say anything about it?

A. To me?

Q. Yeah.

A. Mr. Harkabus told me we were going to the Fifth Avenue Hotel Annex for the arrest of Mr. Bennett.

Q. Do you remember Mr. Harkabus getting a telephone call in your presence from Mr. McRoberts that he was taking Mr. Bennett back to the Fifth Avenue, if he would come up there and get a Warrant he could search the place?

A. I don't know. I'm not sure whether it was Mr. McRoberts or not. There was a telephone call. I do not know the contents of the conversation and

(Testimony of John W. Worsham.)

I couldn't definitely say it was from Mr. McRoberts. I didn't hear it.

Q. So while Mr. Bennett was under arrest by Mr. McRoberts you arrested him then under a Warrant, is that right?

A. I do not know that Mr. Bennett was under arrest by Mr. McRoberts.

Q. Now, isn't it a fact, Mr. Worsham, that at the time that you left the Federal Building to go to the Fifth Avenue Hotel that you knew that McRoberts, the Deputy Marshal, had Bennett in custody and that he was booking him here at the Federal Building to put him in jail?

A. No sir. ,

Q. And that he told you to come to the Fifth Avenue Rooms, Fifth Avenue Hotel and he would have him back there so you could search the place?

A. Mr. McRoberts did not tell me anything. [228]

Q. Now, what did you do when you got up to the Fifth Avenue Hotel?

A. Mr. Harkabus read the Warrant to Mr. Bennett and arrested him.

Q. How did you get in; who opened the door?

A. Mr. Harkabus was in front and the door was opened. I don't know who opened the door.

Q. Mr. McRoberts? A. He could have.

Q. Was Mr. McRoberts there when you got there? A. He was.

Q. And so who else was there?

A. Mr. Bennett.

Q. And who else was there?

(Testimony of John W. Worsham.)

A. Mr. Harkabus and myself.

Q. Was there any ladies there?

A. No, sir.

Q. And where was Mr. Bennett?

A. I do not know.

Q. Now, isn't it a fact, Mr. Worsham, that Mr. McRoberts had taken Mrs. Bennett, Miss Crosby and Mr. Bennett down to the Federal jail before that?

A. I don't know.

Q. You don't know? A. I don't.

Q. Now, do you truly not know? [229]

A. I didn't see him.

Q. Did you hear about it?

A. Did I hear about it?

Q. Yeah.

A. I think I heard that he arrested Mrs. Bennett that day.

Q. And who else?

A. To my recollection that is the only person I remember that he arrested.

Q. And then what did you do after you arrested Mr. Bennett at the room?

A. We made a search.

Q. And what did you find?

A. What did we find?

Q. Yeah. A. In that room?

Q. Yeah.

A. A 380 Spanish automatic gun was found, a 22 caliber rifle, gas coupons were found.

Q. What? A. Gas coupons.

Q. Where were the gas coupons?

(Testimony of John W. Worsham.)

A. When I saw them Mr. Harkabus had them.

Q. Now, isn't it a fact when you went in there they were laying on top of the bureau drawer?

A. I couldn't testify to where they were. [230]

Q. And what else did you get?

A. Did I get?

Q. Yeah, you and Mr. Harkabus and Mr. McRoberts?

A. Mr. Harkabus will have to testify to what he got there, sir.

Q. Did you ever give Mr. Bennett a receipt for what was taken out of that room?

A. I did not.

Q. Isn't it customary to give a receipt when you take something from——

A. He was arrested by Mr. Harkabus.

Q. Didn't you have joint authority with Mr. Harkabus?

A. As far as the arrest is concerned, we did.

Q. Isn't it just as much your responsibility to see that the law is complied with; wouldn't you be equally responsible if an action was brought against you for not giving them a receipt?

A. For not giving them a receipt?

Q. Yeah, don't you know the law says if you take something from somebody you have got to give them a receipt for it?

A. That's correct.

Q. Well, why didn't you see whether Mr. Bennett got a receipt in this instance?

A. I did not give them a receipt.

Q. Did you see Mr. Harkabus give them a

(Testimony of John W. Worsham.)

receipt? [231] A. No, sir, I didn't.

Q. Well, what else did you take now?

A. I did not take anything.

Q. Did Mr. Harkabus take anything out?

A. Did he take anything out?

Q. Yeah.

A. There was two keys, I think were taken, a key with a number on it and another tab with a number on it.

Q. Isn't it a fact that you took out some clothes belonging to Mrs. Bennett and Miss Crosby?

A. I don't think that I took those clothes.

Q. Who took the clothes?

A. I couldn't say who did. I know they were there.

Q. And do you know that they were taken out, even the wet ones that were in the bathroom?

A. I know that they were taken out, yes, sir.

Q. Taken out of the jail?

A. Taken where?

Q. To the jail.

A. I think they were taken to the Marshal's office, sir.

Q. Did you give anybody a receipt for those clothes? A. No, sir, I did not.

Q. Have you ever give them to the lawful owner of those clothes? A. I have not.

Q. You mean that that is all the respect that you have [232] for other peoples' property, you can take it and just leave it lay some place; don't give it back to them if you are not using them?

(Testimony of John W. Worsham.)

A. I did not take that property, sir.

Q. You were in the search though, weren't you?

A. Yes, sir.

Q. You were on the expedition; you was the one that made the arrest, you and Mr. Harkabus?

A. Technically Mr. Harkabus made the arrest. He read the Warrant to Mr. Bennett.

Q. Well, now, you going to put up a technical defense now that you had nothing to do with it?

A. I was there.

Q. You were there. Now, since the preliminary hearing on the 20th of October I believe it was in this case, how many times have you talked to Marilyn Casey?

A. I went with Mr. Harkabus down to Ed Gines' home here in Fairbanks prior to the preliminary hearing. I think I had talked to Miss Casey several times in the presence of Mr. Harkabus.

Q. Did you ever talk to her alone?

A. No, sir.

Q. And where have you talked with her?

A. In our office, and the residence of Ed Gines.

Q. And what was the latest time you talked to her?

A. Prior to the preliminary hearing. [233]

Q. And how many times you talk to her since the Indictment in this case?

A. To my knowledge, none.

Q. Now, isn't it a fact within two weeks Mr. Worsham when Miss Casey was in the office of the,

(Testimony of John W. Worsham.)

or in the Commissioner's Courtroom here that you asked her to come to your office?

A. That was prior to the preliminary hearing, yes, sir.

Q. No, within two weeks, about two weeks ago?

A. No, sir, not to my knowledge.

Q. Do you remember about two weeks ago talking to Miss Casey in the corridor?

A. I saw Miss Casey in the hall.

Q. And you asked her to come to the office?

A. Yes, I told her that I would like to talk to her at a later time.

Q. That's about two weeks ago?

A. Yes, sir, I do recall it.

Q. That's long since the Indictment, isn't it?

A. Yes, sir, that's right.

Q. You ever been in Denver, Mr. Worsham?

A. Yes, sir.

Q. Have you ever been to the Royal Hotel, or the Royal Motel? A. No, sir.

Q. Now, you had a card here that had a lithographed picture on it that says Royal Motel; do you know whether [234] that is the Royal Motel in Denver? A. No, sir, I do not.

Q. You don't know? A. No, sir.

Q. Now, Mr. Worsham, isn't it a fact that when you were in Mr. Kehert's room that you searched the room while Mr. Harkabus held a pistol to the head of Mr. Kehert? A. No, sir.

Q. Isn't it also a fact that you took pictures

(Testimony of John W. Worsham.)

from the possession of Mr. Kehert, pictures of his mother and his family?

A. I did not take those pictures, sir.

Q. Did you see them?

A. I saw an album there, yes, sir.

Q. And he asked you to give them back to him, did he not?

A. I did not have them.

Q. You searched the room, didn't you?

A. Yes, but I didn't take those pictures.

Q. Do you know where those pictures are now?

A. I couldn't say for sure. I think the Marshal has them.

Q. Would you have any objection to him having those pictures back?

A. Not as far as I am concerned. [235]

Q. But you can take them and just blithely wipe them off your mind and memory?

A. I did not take the pictures.

Q. But you were present, were you not?

A. Yes, sir.

Q. On the expedition, made the search while Mr. Harkabus got his gun there?

A. Mr. Harkabus did not hold a gun on Mr. Kehert in the room at any time.

Q. You sure of that?

A. I am positive.

Q. Who was guarding the prisoner while the search was being made?

A. He was sitting down on the bed part of the time, and he was standing up part of the time.

Q. And where was Mr. Harkabus during that time?

A. He was in the room.

(Testimony of John W. Worsham.)

Q. And watching the prisoner, Mr. Kehert?

A. Well, I was watching him, too. I was keeping an eye on him.

Q. Just the one eye?

A. From time to time.

Q. What?

A. From time to time I would glance up and look at him, see he was still there.

Q. Mr. Kehert never made any effort to resist, did he? [236]

A. He did not.

Mr. Taylor: I believe that is all, Mr. Worsham.

Redirect Examination

By Mr. Stevens:

Q. Mr. Worsham, did you know where Miss Casey lived at the time before she was put in jail?

A. Before she was put in jail, I did not.

Q. Do you know where she lived at the time you talked to her?

A. She told me she lived at room 4 of the Transient Rooms.

Q. The same room in which Mr. Kehert lived?

A. Yes, sir.

Q. Was there any reason why you went through the procedure of using a gun in connection with Mr. Kehert's arrest?

A. Miss Casey had told us that Mr. Kehert had a weapon, a gun, and further that at the time of the arrest of Mr. Bennett we had found a gun.

Q. And Mr. Worsham, did the Marshal, Acting

(Testimony of John W. Worsham.)

Marshal at that time also participate in the search of the room? A. He did.

Q. And he took some things in connection with the search? A. He did.

Q. And was it not true that he had just arrested Miss [237] Crosby, or I mean Mrs. Bennett on a Territorial charge before, sometime earlier?

A. I heard after going down there that he had arrested her. I didn't have any knowledge at the time that I went there that he had.

Q. But, Mr. Worsham, to your knowledge there were no Federal Warrants outstanding for Mrs. Bennett at that time, were there?

A. No, not to my knowledge.

Q. It was just Mr. Kehert and Mr. Bennett that were arrested on Federal Warrants at that time?

A. Mr. Bennett was arrested first, later Mr. Kehert.

Q. And the arrest made in regard to the women defendants in this case were arrests made upon territorial charges, is that correct, to the best of your knowledge? A. I have heard.

Q. Mr. Worsham, were you present at any time when Miss Casey saw any of the evidence you took from Mr. Kehert's room, after you took it?

A. Yes, I was.

Q. Did you see this material you brought back?

A. She did.

Q. And did she identify it as being her property? A. She told us it was hers.

Q. And did she object to your retaining that

(Testimony of John W. Worsham.)

property? A. No, she did not. [238]

Q. Did she ever come to you and present a demand for that property? A. No, she has not.

Recross-Examination

By Mr. Taylor:

Q. Mr. Worsham, you know what disposition was ever made of the case upon which Miss Bennett and Miss Crosby was arrested?

A. Do you mean territorial?

Q. Yeah. A. No, I do not.

Q. Well, you say you found a gun in Mr. Kerhart's room? A. No, sir.

Q. He had no weapon there at all?

A. Not to my knowledge. I did not find one.

Mr. Taylor: That's all.

Mr. Stevens: That's all for now. Thank you very much, Mr. Worsham.

(Witness excused.)

EDWARD J. HARKABUS

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Edward J. Harkabus. [239]

Q. Mr. Harkabus, during, until recently that is, were you a member of the Federal Bureau of Investigation here in Fairbanks, Alaska?

(Testimony of Edward J. Harkabus.)

A. Yes, I was.

Q. And did you participate in the investigation of this case before the court today against these four defendants? A. Yes, I did.

Q. And were you in charge of that investigation here in Fairbanks? A. Yes, I was.

Q. Mr. Harkabus, when did you first see Marilyn Jean Casey? A. On the 6th of July.

Q. That was of 1953? A. 1953.

Q. And where did you see her first?

A. I first saw her in the United States Attorney's office.

Q. And that was Mr. Gore's office at that time?

A. Mr. Gore's office, yes.

Q. And did you have an interview with Miss Casey on the same day?

A. Yes, at that—we began the interview in Mr. Gore's office after then Acting Marshal McRoberts had advised us that she had been arrested for operation of a bawdy house [240] or vagrancy, I don't recall exactly which; and interviewed Miss Casey and she advised—we asked her how she had, what had been her method of travel from Texas to here, and she said that she had flown up. So then we told her that it was an easy matter to check the records at the border to find out how she actually did come into the Territory of Alaska, so finally she——

Mr. Taylor: Just a moment. I am going to object to the further line of this questioning, your Honor, unless it is shown that at least one of these

(Testimony of Edward J. Harkabus.)

defendants was present. It was a conversation out of the presence of the defendant.

The Court: I will sustain the objection.

Q. (By Mr. Stevens): Well, did you continue interviewing in your own office later that day, is that your statement prior to this?

A. Yes, I did.

Q. Now, this is Government's Identification 30, Mr. Harkabus; are you familiar with that identification? A. Yes, I am.

Q. Did you assist at all in the preparation of that Government's Identification 30, Mr. Harkabus?

A. Yes, I did.

Q. What exactly did you do to prepare it?

A. This statement was, I dictated the preamble wherein it states that this statement was given voluntarily, after asking Miss Casey if she desired to give a voluntary statement [241] and she answered in the affirmative, and no threats or promises of reward or otherwise had been made to her; and we told her that she didn't have to make a statement unless she wanted to, so then the balance of the statement was dictated by Miss Casey with the exception of a few instances, when, for the purposes of clarity and continuity we changed the wording around so it would read more correctly. I read the statement to Miss Casey. She read it herself. I asked her if all the facts in this statement were true and correct and I said if they are I asked her if she desired to sign it, and she did sign it in my presence,

(Testimony of Edward J. Harkabus.)

because my signature is here and in the presence of John Worsham.

Q. And in various places on that statement the initials "M.J.C." appear; did she place the initials on there?

A. Yes, she did. She initialed each correction.

Q. Who actually typed it?

A. Mrs. Chesser of the Marshal's office.

Q. Hers was a stenographic function?

A. That's correct.

Q. That first paragraph, would you tell us whether or not that is the standard form, paragraph used by the FBI?

A. Well, not necessarily a standard, just the fact that no threats or promises have been made to the individual giving the statement so that at a later date if that did occur——

Q. Is it your custom? [242]

A. This is probably my style I might say, yes.

Q. Now, did you suggest any of the answers or any of the content of that statement to Miss Casey?

A. Well, it was Miss Casey's story and she wasn't too familiar with some of the towns. For example, Orville, Washington, and so forth, and I secured road maps as well as the guide of the Alaska Highway in an attempt to help her explain the route of travel.

Q. But did you tell her, for instance, where she stayed in Denver, Colorado?

A. No, she told me where she——

Mr. Taylor: Just a moment, your Honor. We are

(Testimony of Edward J. Harkabus.)

going to object again to that conversation made out of the presence of the defendants, swinging right back into it again.

The Court: Objection overruled.

A. Would you repeat your question again?

Q. (By Mr. Stevens): I said did you tell her where she stayed in Denver, Colorado?

A. No, I didn't tell her. She told me. I wouldn't know otherwise where she had stayed.

Q. Had you had any information concerning any fact related to this case prior to the time you were notified by Miss Casey?

A. No, I had not. [243]

Q. And this statement was taken in conjunction with the first part of your investigation of this case?

A. Yes, it was.

Q. And did you at that time make any promises to Miss Casey?

A. I did not. No promises were made in my presence at all to Miss Casey, or threats or otherwise.

Q. Now, Mr. Harkabus, did you see Miss Casey subsequently in regard to Government's Identification 31?

A. Yes. This is an affidavit that was an affidavit of facts which was filed before the United States Commissioner on July the 8th of 1953, and I recall at the time that this affidavit was filed that Mrs. Nordale asked Miss Casey if she had read it and was fully aware of the content of this affidavit. She said that she was and it bears her signature and the signature of Mrs. Nordale.

(Testimony of Edward J. Harkabus.)

Q. And did you prepare that as an affidavit for a statement of fact in connection with your investigation?

A. As I recall, this is just a brief excerpt of the original statement furnished by Miss Casey and it was prepared by Mrs. Zimmerman.

Q. In my office? A. In your office.

Q. At that time it was prepared at Mr. Gore's request, is that it? A. Yes. [244]

Q. And was that to your knowledge pursuant to the authority to take an affidavit of facts in connection with the filing of a case in the Commissioner's Court?

A. Well, sometimes in cases of this type we secure an affidavit of facts.

Q. And was that made voluntarily by Miss Casey?

A. Well, her signature is on it, Mr. Stevens.

Q. Well, I mean did you threaten to put her back in jail if she did not sign it?

A. For the record I would like to have this point very clear that at no time did I ever make any threats or promises to Miss Casey. I didn't tell her that she would be removed from jail, placed in jail, or any other thing along that line.

Q. Well, now, Mr. Harkabus, in connection with this interrogation, did Miss Casey tell you where she was living at the time? A. Yes, she did.

Q. And where was that?

A. She told me she was living at room 4 of the Transient Rooms with the defendant Mr. Kehert.

(Testimony of Edward J. Harkabus.)

Q. Did she tell you in particular any property that she had in that room?

A. She told us that she had a baby Brownie camera and several rolls of film that she had taken en route up the highway as well as clothes, her own clothes.

Q. This is Government's Identification 43. Would you tell us what that is, please? [245]

A. This is a baby Brownie camera recovered in the room of Wesley Kehert on July 6th, 1953, at room 4 of the Transient Rooms.

Q. And did you ever show that camera to Miss Casey? A. Yes, I did.

Q. Did she identify that camera?

A. Yes, she did.

Q. And did she make a demand from you to give it back to her?

A. At the time we went out there she said that she would like to have her camera and wanted to know if we would get it. Well, inasmuch as it was evidence we got it and told her it would be returned to her upon completion of this trial. She said that was fine with her.

Q. Now, these are Government's Identification 38 through 42, Mr. Harkabus. This is 38. Would you tell us if you know what that is, please. What is the written material that is contained inside of the paper that you have in your hand there, Mr. Harkabus?

A. Well, this is in my handwriting. This film was obtained from Wesley Kehert's room, room No.

(Testimony of Edward J. Harkabus.)

4, Transient Rooms. It was a camera. This film was developed in my presence by Earl Wyman, 534 Second Avenue, on July 7, 1953, and identified by punch mark and this note bears my signature. I can recognize the negative. This was sealed. This container was sealed. This is a negative here. It isn't very clear. [246]

Q. Could you identify similarly the other four rolls? A. I beg your pardon?

Q. Would you identify similarly the other four rolls there?

A. Yes. This is Number 3, incidentally.

Q. They are in line, Mr. Harkabus, from the other end.

A. This is film obtained from Wesley Kehert's room on 7-6-53, Number 4, Transient Rooms, and developed in my presence by Earl W. Wyman and his address, on July 7, 1953. It bears my initials. It also bears the arbitrarily designated punch marks with which I punched the negatives in the dark-room, of Mr. Wyman's studio. This is Number 39. This is film obtained from Wesley Kehert's room on July 6th, Room Number 4, Transient Rooms; film was developed in my presence by Earl W. Wyman, 534 Second Avenue, 7-7-53. It bears my initials. It also bears the punch marks as indicated previously.

Q. That is Identification 40?

A. This is No. 40, yes. This is the same film obtained from Wesley Kehert's room on 7-6-53, No. 4, Transient Rooms, developed in my presence by Earl W. Wyman on 7-7-53, bears my initials and the punch marks. That is No. 41.

(Testimony of Edward J. Harkabus.)

This is No. 42. This is identical with the other ones. Film obtained from Wesley Kehert's room 7-6-53, Room Number 4, Transient Rooms, and developed in my presence by Mr. Wyman on [247] 7-7-53.

Mr. Stevens: Would you care to take the recess at this time, your Honor?

The Court: Yes, ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Defendant so stipulates.

Mr. Stevens: We so stipulate, your Honor.

The Court: Very well. Proceed.

EDWARD HARKABUS

the witness on the stand at the time the recess was taken, resumed the stand for further

Direct Examination

By Mr. Stevens:

Q. You identified the last Government's Identification 42? A. Yes, I did.

Q. And those—were those all developed in your presence? A. Yes, they were.

Q. And they were all identified by Miss Casey, is that your testimony?

(Testimony of Edward J. Harkabus.)

A. The prints and the negatives were both identified by Miss Casey, yes.

Q. Now, Mr. Harkabus, I hand you [248] Government's Identifications 1 through 29, a set of pictures; would you tell us, please, one by one, what those are and who put the writing on them?

A. Well, I would like to explain that the rolls were numbered just with a arbitrary number. We had no way of knowing exactly when and where, in what order they had been shot. Therefore, we designated roll No. 1 and I punched one punch mark into the negative and each print is subsequently identified with that roll. For example, Roll No. 1, photograph 1, which is what I hold in my hand at this time. The handwriting on the back is mine, and Miss Casey looked at each one of the prints and told me——

Mr. Taylor: Your Honor, we are going to object to what Miss Casey told him.

The Court: Objection overruled.

A. Miss Casey told me where the photographs were taken to the best of her recollection, who the individuals were in each one of the pictures and this one is a photograph it states Roll No. 1, taken from camera, photograph No. 1, Jack Bennett and Betty Bennett standing near Wesley Kehert's Buick, taken after crossing the border at Snag, Yukon Territory.

Q. (By Mr. Stevens): Is that your handwriting; you put that on the bottom?

A. Yes. [249]

Q. Is that Government's Identification 1?

(Testimony of Edward J. Harkabus.)

A. This is Government's Identification 1.

Q. Thank you.

A. Government's Identification No. 2—these are not in order according to pictures, I see—by your exhibit number. Roll No. 2, Picture No. 4, is a photograph of Norma Crosby. This is Government's Identification No. 3, Roll No. 2, Picture No. 8, Wesley Kehert and Marilyn Casey.

Mr. Taylor: Where was that taken? I don't want to interrupt for each individual picture, but I believe it would be a good idea to see where each one was taken, the location of the shot.

Q. (By Mr. Stevens): Well, Mr. Harkabus, can you tell from your own knowledge where those pictures were taken?

A. Well, as I recall, this one it was taken in British Columbia near the 150 mile house on the British Columbia Highway No. 2.

Q. And where did you secure that information?

A. Well, I secured that from Miss Casey because she was standing in a subsequent photograph in this same row at the 150 mile house and stated that this gas station which is in Government's Exhibit No. 3 was in the immediate vicinity.

Government's Identification No. 4 is Roll No. 2, Picture No. 7, photograph of Fern Bennett, Wesley Kehert and Carrol Ward. This was taken in the front of this same gas [250] station that I have previously outlined in Government's Exhibit No. 3.

Roll No. 2, Picture 3, is Government's Identification No. 5, left to right, Marilyn Casey, Norma

(Testimony of Edward J. Harkabus.)

Crosby, Carolyn Ward, Steve Williams which is an alias of Wesley Kehert.

Government's Identification No. 6, Roll No. 2, Picture No. 1, Carolyn Ward, Fern Bennett, Norma Crosby, Wesley Kehert, and a photograph of the Mercury automobile. This was taken at the same gas station, at 150 mile roadhouse.

Government's Identification No. 7, Roll No. 2, Picture No. 2, photograph of Norma Crosby, Marilyn Casey, Carolyn Ward, Fern Bennett, and the Mercury with the Texas license KS 7118. This was taken in the vicinity of the 150 mile house.

Government's Identification No. 8, Roll No. 3, Picture No. 3, photograph of Jack Bennett, the Buick, Bennett's Cadillac, the Mercury, at 150 mile house on British Columbia Highway No. 2.

Government's Identification No. 9, Roll No. 3, Picture No. 2, Norma Crosby, Fern Bennett, Carolyn Ward, the back of Wesley Kehert's Buick, Jack Bennett's Cadillac taken at 150 mile house. It is the same gas station.

Government's Identification No. 10, Roll No. 3, Picture No. 1. It is a photograph of Wesley Kehert. I don't know where it was taken.

Government's Identification No. 11, Roll No. [251] 3, Picture No. 4, is a photograph of Marilyn Casey taken by Wesley Kehert at 150 mile house, British Columbia Highway No. 2. There is a sign in this photograph showing that it is 150 mile house.

Government's Identification No. 12, Roll No. 3, Picture No. 8, is a photograph of a small town in

(Testimony of Edward J. Harkabus.)

British Columbia taken by Marilyn Casey from inside of Mr. Kehert's Buick. This town, according to Miss Casey, is located below 150 mile house.

Government's Identification No. 13, which is Roll No. 3, Picture No. 7, is a photograph of Jack Bennett and Wesley Kehert purchasing ice in a small British Columbia town. No name.

Government's Identification No. 14, Roll No. 4, Picture No. 2, photograph of Williams and Bennett, Mercury and Buick on the Alcan Highway.

Roll No. 4, Picture No. 1—this is Government's Identification No. 15—Jack Bennett, Norma Crosby on the Alcan Highway and the Mercury automobile.

Government's Identification No. 16, Roll No. 4, Picture No. 8, taken by Marilyn Casey on a broken-down bridge in British Columbia.

Government's Identification No. 17, Roll No. 4, Picture No. 7, Marilyn Jean Casey, the Buick, and I don't know the location.

Government's Identification No. 18 is Roll [252] No. 4, Picture No. 4, photograph of Wesley Williams and Fern Bennett embracing.

Government's Identification No. 19 is Roll No. 4, Picture No. 5, Fern Bennett, Jack Bennett, Carolyn Ward, Norma Crosby and the photograph of Mr. Bennett's Cadillac.

Government's Identification No. 20, Roll No. 4, Picture No. 3, Norma Crosby, Fern Bennett, and, according to the notation here, Steve Williams possibly took the picture.

Government's Identification No. 21, Roll No. 5,

(Testimony of Edward J. Harkabus.)

Picture No. 2. It is a crane on a bridge taken by Marilyn Casey. This was taken about ten miles from Haines Junction cutoff.

Government's Identification No. 22 is Roll No. 5, Picture No. 1, a pile-driver taken by Marilyn Jean Casey at a broken-down bridge about ten miles from Haines Junction cutoff.

Government's Identification No. 23, Roll No. 5, Picture No. 3. It is the same bridge as I have previously described.

Government's Identification No. 24 is Roll No. 5, Picture No. 8. It is a photograph of the Alaska border showing the Alaska sign and according to Miss Casey this was taken by Steve Williams or Wesley Kehert, excuse me.

Government's Identification No. 25, Roll No. 5, Picture No. 7, is a photograph of the Buick parked on a washed-out bridge about thirty miles from the Canadian border, [253] taken by Mr. Kehert, according to Miss Casey.

Government's Identification No. 26, Roll No. 5, Picture No. 6. This is the same location as the pile-driver that I have previously described on the bridge.

Government's Identification No. 27, Roll No. 5, Picture No. 5, is on the same bridge.

Government's Identification No. 28, Roll No. 5, Picture No. 4, photograph of Marilyn Casey sitting on the rail of this bridge, taken by Mr. Kehert.

Government's Identification 29 is Roll No. 4, Pic-

(Testimony of Edward J. Harkabus.)

ture No. 6, Marilyn Jean Casey, the Buick, and it was taken between Whitehorse and the Alaska-Canadian border.

Q. Thank you, Mr. Harkabus. This is Government's Identification 45. Would you tell us have you seen that before? A. Yes, I have.

Q. Where did you see that?

A. To the best of my recollection this was picked up by Mr. Worshman at Mr. Kehert's room at the Transient Rooms, and prior to this time Miss Casey had advised us that Jack Bennett, Fern Bennett, and Norma Crosby had stayed at the Royal Motel in Denver, Colorado, and Miss Casey had stated that while in Denver she had made a purchase of slacks or pedal pushers at a store in Denver.

Q. This is Government's Identification No. 46; will you tell us what that is, please? [254]

A. This is the name of the shop, this is a bag from the shop where Miss Casey stated that she had purchased these slacks or pedal pushers and it was taken from Mr. Kehert's room at the time of his apprehension by Special Agents Worsham and myself.

Q. Now, Mr. Harkabus, these are twenty-two coupons, Government's Identifications 35 and 36, which are two separate coupons and Government's Identification 44 comprises twenty coupons. Would you identify those for us, please?

A. Identifications 35 and 36 are gasoline coupons on a credit card issued in the name of W. W. Bennett at Denver, Colorado, and they bear my initials.

(Testimony of Edward J. Harkabus.)

These were seized from Mr. Bennett's person at the time of his apprehension at Room 404 of the Fifth Avenue Annex. The others—are the rest of these numbered as exhibits, Mr. Stevens?

Q. All twenty coupons comprise one Identification 44, Mr. Harkabus. There are two separate—

Mr. Taylor: I think at this time, Mr. Harkabus, you just state generally what they are and not who they are made out to.

Mr. Harkabus: I beg your pardon.

Mr. Taylor: I think you should state just now just generally what they are, not the details of them.

Mr. Stevens: I will ask the questions, Mr. Harkabus.

A. All twenty of these gasoline coupons were found in the possession of Mr. Bennett at the time of his apprehension on July 6th. [255]

Q. (By Mr. Stevens): And were they actually on his person?

A. Yes, they were. They were in his wallet.

Q. Mr. Harkabus, do you know who W. W. Bennett is?

A. That is Mr. Bennett's father.

Q. Mr. Harkabus, going back to Miss Casey, did you see Miss Casey after she signed the second affidavit, or the affidavit which is the second document in question here?

A. Yes, I did.

Q. And where did you see her next?

A. She was in my office at that time, and as I recall it was in August. I can't recall the exact date.

(Testimony of Edward J. Harkabus.)

I have seen her subsequent to that time on several different occasions. On one occasion prior to the preliminary hearing with Special Agent Worsham, and that was October the 20th, I believe. I'm not positive of that date, and then again in November the 21st, 1953.

Q. Now, at the time you saw her before the preliminary hearing, would you tell us whether or not that was at my request to see whether or not she was still in town?

A. Yes, that's correct.

Q. And at that time did you make any threats or promises to Miss Casey? A. I did not.

Q. And did you see her after the preliminary hearing? A. Yes, I did.

Q. And when did you see her after the preliminary hearing? [256]

A. That was on November 21st.

Mr. Taylor: What date?

Mr. Harkabus: November 21, 1953.

Q. (By Mr. Stevens): Who were you with at that time?

A. Special Agent Sullivan also of the FBI.

Q. And where were you when you saw her?

A. At the residence of Neil Robertson, 20th and Liska.

Q. That is also the residence of Ed Gines?

A. Oh, no, the residence of—on one occasion I saw Miss Casey at the residence of Ed Gines which

(Testimony of Edward J. Harkabus.)

was prior to the preliminary hearing when we interviewed her at your request.

Q. And then this time subsequent to the preliminary hearing when you were with Mr. Worsham it was at Neil Robertson's?

A. I was with Mr. Sullivan at Neil Robertson's and Mr. Worsham at Ed Gines'.

Q. At that time when you were with Mr. Sullivan, did you make any threats or promises to Miss Casey? A. I did not.

Q. What was the purpose of seeing her at that time after the preliminary hearing?

A. Well, I asked Miss Casey if——

Mr. Taylor: Well, your Honor, we are going to [257] object to conversation after the preliminary hearing—not binding upon these defendants.

Mr. Stevens: Your Honor, I believe it all goes to the weight that the jury may give to the statement which——

The Court: Objection overruled.

Mr. Stevens: Thank you.

A. I asked Miss Casey why she had gone back on her original statement when our investigation corroborated all the facts that she had furnished to us in her statement.

Mr. Taylor: Just a moment, your Honor. I'm going to object to this line of testimony. I think when a person impeaches their own witness they can show that they made contrary statements to what they testified to on the stand, and they can't go into the details of it. I think if Mr. Stevens wants to im-

(Testimony of Edward J. Harkabus.)

peach his own witness, Miss Casey, that he can ask this man if Miss Casey made contrary statements to that, but I don't think they can go into conversations, your Honor.

The Court: I don't agree with you at all about that. You can impeach a witness for everything except they have a bad reputation for truth and honesty. You can impeach them on any other subject. The objection is overruled.

Q. (By Mr. Stevens): Will you continue, please Mr. Harkabus?

A. Well, I asked Miss Casey then if she was going to [258] tell the truth before the grand jury, and what was the truth, actually. So she said that I should know because she couldn't possibly fabricate the facts which had been borne out by investigation to the point where it would all stand up. Then she asked me what I wanted her to say and I advised her at that time that I didn't want her to say anything except to tell the truth before the grand jury and that was sufficient. That generally was the extent of the conversation with Miss Casey.

Q. Now, Mr. Harkabus, did anyone else to your knowledge make any threats or promises for the statement which you took on the 6th of July?

A. No. Absolutely no.

Q. When you went to Mr. Kehert's room at the Transient Rooms, Mr. Harkabus, did you find any of Miss Casey's things in that room other than that are here today?

Mr. Taylor: We object, your Honor, upon the

(Testimony of Edward J. Harkabus.)

grounds that the other things would be the best evidence, no statement about them.

The Court: Objection overruled.

A. Frankly, I don't know what Miss Casey's things were, but she did state that——

Mr. Taylor: We are objecting to what she stated was in there. I think it is as to what Mr. Harkabus found in there, your Honor. [259]

The Court: I think you can state what she said.

A. What she said, yes, sir. She advised us that she had clothes in Mr. Kehert's room and that she was living there with him at that time and from her description of several articles of clothing they appeared to be identical from her description and I believe that, in fact I believe she subsequently——

Mr. Taylor: We are going to object to what he believes, your Honor—a conclusion.

The Court: Just tell what you know.

A. Well, the clothes were identified as being hers, your Honor. Did that answer your question, Mr. Stevens?

Mr. Stevens: Yes. Thank you, Mr. Harkabus.

The Clerk: Government's Identification No. 47 and Government's Identification No. 48.

(Room key for room 405, 5th Avenue Hotel, was marked Government's Identification No. 47; room key for room 404, 5th Avenue Hotel, was marked Government's Identification No. 48.)

Q. (By Mr. Stevens): These are Government's

(Testimony of Edward J. Harkabus.)

Identifications 48 and 47, Mr. Harkabus; would you tell us what those are, please?

A. Nos. 47 and 48. No. 47 is a numerical designation for Room 405 in the Fifth Avenue Hotel and No. 48 is a key to Room 404 in the Fifth Avenue Hotel, which were taken at the time that Mr. Bennett was arrested. [260]

Q. And did you inform the owner of the hotel that you wished, or the person in charge that you wished to keep those?

A. I told Mrs. Whispell that we were taking these and upon completion of the trial they would be returned to her. At the time Mr. Bennett was arrested——

Mr. Taylor: We are going to object to any voluntary statements not evicted by a question.

Q. (By Mr. Stevens): At the time Mr. Bennett was arrested did you ask him any questions concerning these keys, Mr. Harkabus?

A. Yes, I did.

Q. And what did you ask him?

A. I asked him if——

Mr. Taylor: We are going to object, not the proper foundation laid for the question. Time, place, presence of other persons.

Q. (By Mr. Stevens): Mr. Harkabus, is this the same time you have already described that you were in the company of Mr. Worsham and you made the arrest of Mr. Bennett?

A. This was on July 6th at the Fifth Avenue Hotel at 5:01 p.m., when Special Agent Worsham

(Testimony of Edward J. Harkabus.)
and I went to Room 404 of the Fifth Avenue Hotel and arrested Mr. Bennett.

Q. Now, will you tell us what you asked him, please?

A. I asked Mr. Bennett if—— [261]

Mr. Taylor: Who else was there?

Mr. Stevens: Your Honor, I am going to ask that Mr. Taylor make his objections to the Court and wait to ask questions of the witness until he has the right to cross-examination, if you please.

The Court: Address yourself to the Court, Mr. Taylor.

Q. (By Mr. Stevens): Did you ask him a question, Mr. Harkabus?

A. I asked him if he was living there alone.

Q. And what did he tell you?

A. And he said that he was.

Q. And did you ask him to explain the key to the other room?

A. I asked him to explain the key to the other room as well as some unmentionables which were feminine in nature that were hanging in the bathroom.

Q. And what did he say?

A. Well, Mr. Bennett at that time stated that some of the girls from next door had been washing their things in there.

Mr. Stevens: Your Honor, at this time the government offers into evidence Government's Identifications 1 through 29 to be one exhibit. We believe they should be one exhibit. They have all been

(Testimony of Edward J. Harkabus.)

identified as having come into possession of the government at the same time, have [262] been identified by Miss Casey and are pictures taken on the trip from Texas to Fairbanks, Alaska.

Mr. Taylor: We object, your Honor, to the introduction of these pictures, that they are retouched photographs, contain testimony of persons not under oath; on the back of them that they have been marked in by this witness at a long time prior to this, and no explanation, your Honor, has been made for the introduction of them. A lot of them they don't know where they have been taken. Those should all be eliminated from these identifications or exhibits. I think they in no way connected with these defendants or this trip, can't see where they go to prove any of the facts of the case, your Honor.

The Court: Objection overruled. They may be admitted.

The Clerk: Government's Exhibit E (1 to 29).

(Government's Identifications 1 through 29 were received in evidence as Government's Exhibit "E (1 to 29).")

Mr. Stevens: At this time, your Honor, the government offers also as one exhibit the five rolls of film from which Government's Exhibit "E" were printed.

Mr. Taylor: We object, your Honor, upon the grounds that they were seized without a valid Search Warrant, without any Search Warrant at all, and not incident to any arrest.

(Testimony of Edward J. Harkabus.)

The Court: Objection overruled. [263]

The Clerk: Government's Identification 38 is Government's Exhibit "F"; Identification 39 is Exhibit "G"; Identification 40 is Exhibit "H"; 41 is "I," and 42 is "J."

(Government's Identifications 38 through 42 were received in evidence as Government's Exhibits "F" through "J," inclusive.)

Mr. Stevens: And the government offers into evidence Government's Identification 43. This is the camera which was taken at the same time, your Honor, and I point out that the question of the validity of the search involved in this case has already been decided by the Court.

Mr. Taylor: I am raising a question again, your Honor, for the record that the search, the introduction of these things upon the grounds that the search was invalid, not incidental to an arrest, no valid Search Warrant had been issued when they had plenty of opportunity to obtain a Search Warrant, your Honor.

The Court: Objection overruled; may be admitted.

The Clerk: Government's Exhibit "K."

(Government's Identification No. 43 was received in evidence as Government's Exhibit "K.")

Mr. Stevens: We offer Government's Identifications 35 and 36 and 44 as one exhibit likewise,

(Testimony of Edward J. Harkabus.)

your Honor. These are coupons taken from the person of Mr. Bennett at the time he was [264] arrested.

Mr. Taylor: Your Honor, we are going to object to those, that they were the property of the defendant. They do not go to prove any of the material elements of the crime charged in the Complaint; that they were seized without a valid Search Warrant. They were not seized as incident to an arrest; that at the time they were seized that Mr. Bennett had been under arrest, had been in jail and was taken from the jail back to the Fifth Avenue Hotel so he would be there so he could serve a Warrant on him and make a search of the premises. We think, your Honor, it is strict evasion of the law regarding Search Warrants. We feel, your Honor, that those coupons are not admissible in evidence and for the further reason they do not connect these defendants with the commission of any crime or the crime charged in the Indictment.

The Court: Objection overruled. It may be admitted.

The Clerk: Identifications 35 and 36 and 44 are Government's Exhibit "L."

(Government's Identifications 35, 36 and 44, were received in evidence as Government's Exhibit "L.")

Mr. Stevens: We would like to offer into evidence Identification 45, which is a photograph post-

(Testimony of Edward J. Harkabus.)

card of the Royal Motel which has been identified in a similar manner, was taken from the room in which Mr. Kehert was found and had been identified as the property of Marilyn Jean Casey.

Mr. Taylor: Your Honor, the only person asked about that was Mr. Worsham and he said he couldn't identify [265] it as the Royal Motel in Denver. He says it is just a picture that he saw. We are going to object. There is no identification to that being it.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "M."

(Government's Identification No. 45 was received in evidence as Government's Exhibit "M.")

Mr. Stevens: And we offer into evidence at this time the shopping bag in which the camera, the film and the post card were found. This is Government's Identification 46, your Honor.

Mr. Taylor: We object, your Honor, upon the grounds it is incompetent, irrelevant and immaterial, do not tend to prove any of the material issues of the crime charged in the Indictment, to wit, the transportation of a person for the purpose of prostitution, or any of the elements of a conspiracy to violate the laws of the United States.

The Court: Objection will be overruled. It may be admitted.

The Clerk: Government's Exhibit "N."

(Testimony of Edward J. Harkabus.)

(Government's Identification No. 46 was received in evidence as Government's Exhibit "N.")

Mr. Stevens: We would like to offer into evidence Government's Identification 30, which is the statement of Marilyn Jean Casey, on the ground that it is a prior inconsistent statement of the witness before the court and it should [266] be admitted in order that the jury may give the proper weight to the testimony of this witness before the court.

Mr. Taylor: We are objecting to that, your Honor, on the grounds that it was made under duress, threats, promises and was prepared according to the testimony of the witnesses by others than Miss Casey. We don't feel, not sworn to, your Honor, and would have no bearing upon the issues of this case.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "O."

(Government's Identification No. 30 was received in evidence as Government's Exhibit "O.")

Mr. Stevens: The government makes a similar offer for Government's Identification 31, which is an affidavit signed by Marilyn Jean Casey under oath which contains excerpts from the Government's Exhibit "O," your Honor, made two days later, after it.

(Testimony of Edward J. Harkabus.)

Mr. Taylor: We object, your Honor. That was a statement prepared by Mrs. Zimmerman in the office of the United States Attorney and not from information received from Miss Casey but was prepared and words used in there that Miss Casey had no knowledge of. It is not her statement.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "P."

(Government's Identification No. 31 was received in evidence as Government's Exhibit "P.") [267]

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: If the court please, we will be quite awhile with this witness. I wonder if we could take the recess now.

The Court: Yes. In a moment we will take a recess until two o'clock, ladies and gentlemen of the jury. In the meantime remember not to talk about the case or the parties or permit anyone to talk about it within your hearing. You are not to talk about or listen to anyone talking about parties to the case. Keep your minds perfectly free from an opinion as to the merits of this case and the guilt or innocence of these defendants until the case is finally submitted to you. Make the adjournment.

The Clerk: Court is recessed until two o'clock.

(Thereupon, at 11:50 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

Mr. Stevens: Your Honor, I would like to ask your Honor's permission in allowing me to put Mrs. Nordale on the stand for the purpose of identifying this Government's Exhibit. Mrs. Nordale was a spectator in this court during the trial after the rule had been invoked, put in excluding witnesses. We are offering her testimony only for the purpose of showing the formal aspects of this affidavit [268] and not for the purpose, for the truth of any of the matters set forth in the affidavit.

Mr. Taylor: We are going to insist, your Honor, that we abide by the rule. Mrs. Nordale was in here all day yesterday when Marilyn Casey was testifying.

The Court: Very well.

Mr. Stevens: Call Mrs. Nordale, will you, please?

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

LA DESSA NORDALE

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. La Dessa Nordale.

Q. And what is your occupation here in Fairbanks, Alaska?

A. United States Commissioner, Fairbanks Precinct, Fourth Division.

Mr. Taylor: Mr. Stevens, at this time, your Honor, I am going to make a formal objection to Mrs. Nordale testifying upon the grounds that she has been a witness, spectator in this courtroom during the examination of a witness, [269] Marilyn Jean Casey, and that to allow her to testify at this time would be a violation of the exclusion rule.

Mr. Stevens: That is correct, your Honor. Mrs. Nordale was in the courtroom.

The Court: I will sustain the objection then.

Mr. Stevens: Very well. Thank you, Mrs. Nordale.

(Witness excused.)

Mr. Stevens: Call Mr. Harkabus back on the stand.

Mr. Taylor: Mr. Stevens, did you finish with Mr. Harkabus this morning?

Mr. Stevens: I believe he is your witness, Mr. Taylor.

EDWARD J. HARKABUS

the witness on the stand at the time the recess was taken, resumed the stand for

Cross-Examination

By Mr. Taylor:

Q. Now, Mr. Harkabus, how long have you been a member of the FBI?

A. Six years, Mr. Taylor, a little bit over.

Q. And are you still connected with the FBI?

A. No, I'm not. I resigned the latter part of January.

Q. And how long were you stationed in or about Fairbanks?

A. Well, intermittently over two years.

Q. Now, calling your attention to the 6th day of July, 1953, did you see Marilyn Casey on or about that date? [270]

A. On July 6th?

Q. Yes. A. Yes, I did.

Q. And had you seen her before that date?

A. I had not.

Q. Did you have any personal knowledge of Marilyn Casey of being arrested prior to that time?

A. Yes, I did. I heard that she had been arrested.

Q. And what time of the day did you talk to Marilyn Casey on the 6th day of July, 1953?

A. Well, I will give you an approximation. I would say it was about ten o'clock or eleven o'clock in the morning.

Q. And where did that examination take place?

(Testimony of Edward J. Harkabus.)

A. It began in the office of then Assistant United States Attorney T. N. Gore.

Q. And who was present?

A. Mr. Gore was present, myself and Special Agent Worsham.

Q. Mr. McRoberts there?

A. I don't recall, Mr. Taylor, whether he was there or not.

Q. And was she brought into the office of Mr. Gore by a Deputy Marshal?

A. I think when I arrived there she was in the office, as I recall it.

Q. But you don't remember whether or not there was a Deputy Marshal there? [271]

A. I don't recall, Mr. Taylor. There could have been.

Q. And that was the first time, though, that you saw Miss Casey? A. Yes.

Q. Well, how long did you question Miss Casey when you were in Mr. Gore's office?

A. Oh, I would estimate that I was there in Mr. Gore's office for approximately a half hour, perhaps longer.

Q. And what, if anything, did you tell Miss Casey in regard to her right to refuse to answer any questions?

A. I told her that she didn't have to answer if she didn't want to.

Q. Did you inform her that she was entitled to an attorney?

(Testimony of Edward J. Harkabus.)

A. She wasn't under arrest. I hadn't arrested her, Mr. Taylor. That wasn't my job.

Q. Isn't it a fact, Mr. Harkabus, that she had been arrested on July 3rd and was under arrest at the time she was in your office?

A. I don't know that of my own knowledge. I didn't arrest her.

Q. You just stated a few moments ago that you knew she was under arrest?

A. I had heard that she had been, yes.

Q. Isn't it customary that if a person is under arrest and brought before you that you inform them that they don't have to make a statement? [272]

A. Yes.

Q. And they are entitled to counsel?

A. Yes.

Q. And do you know whether or not——

A. Not under all conditions, Mr. Taylor. We were—when you are interviewing someone you don't have to say that they are entitled to have an attorney, and that is what we were doing.

Q. But she was in the custody of the United States Marshal at the time?

A. Yes, not my custody.

Q. Well, the custody of the United States is you and the Marshal?

A. No, there is a difference because I had nothing to do with her arrest.

Q. Now, what was the procedure in questioning Miss Casey? A. I don't understand.

Q. What did you say to her as an introductory

(Testimony of Edward J. Harkabus.)

statement or introductory phrase to get this thing under way?

A. Well, I identified myself to her, told her who I was, that I was with the FBI, that she did not have to make a statement to me at that time. I then asked her how she came to the Territory inasmuch as she had been arrested as I recall for the operation of a bawdy house. And at first—— [273] (interrupted.)

Q. Where did you ascertain she was arrested for operation of a bawdy house?

A. Well, I believe Mr. Gore told me, or perhaps Mr. McRoberts.

Q. Isn't it a fact she was arrested for vagrancy?

A. I don't know, Mr. Taylor.

Q. But you are under the impression at this time she was under arrest for operation of a bawdy house?

A. I testified here earlier that she was under arrest for operation of a bawdy house or vagrancy.

Q. And you stated then you told her some of her movements from the states to Alaska?

A. No, I didn't tell her her movements.

Q. She told you how she came to Alaska by car?

A. She first told us she came by plane.

Q. She changed that story, did she?

A. Yes.

Q. And she did come by car? A. Yes.

Q. And now in that examination who was doing the questioning, Mr. Harkabus?

A. I was, and Agent Worsham was.

(Testimony of Edward J. Harkabus.)

Q. Mr. Gore was? A. I believe so.

Q. All firing questions at Marilyn Casey?

A. Well, it isn't—I wouldn't say firing. We asked questions of her, yes. [274]

Q. The usual method is that when the police or officers of the law have a man in custody or a woman in custody they gather around and start shooting questions at them. In all probability you have done that before, haven't you, Mr. Harkabus?

A. I have interviewed several people before, Mr. Taylor, yes.

Q. And a lot of times in examinations such as that you suggest the answers to the witness, do you not?

A. Well, we are fact-finders, Mr. Taylor.

Q. Even if you have to put a fact in the mind of the person that you are questioning?

A. I don't think that that is a true statement. We don't put—— (interrupted).

Q. I am not making a statement. I am asking a question. A. Well, it is speculation.

Q. You can answer it as you see fit.

A. Would you repeat it then, Mr. Taylor?

(The reporter read the question as follows:
“Even if you have to put a fact in the mind of the person that you are questioning?”)

A. I would say that was impossible, Mr. Taylor.

Q. Don't you suggest to them sometimes as to what you think happened, or if you had had prior knowledge you would tell this person, didn't you do

(Testimony of Edward J. Harkabus.)

such and such, or didn't you go such a place? [275]

A. Well, I ask questions, certainly, trying to get at facts.

Q. And sometimes to get a fact out you have to plant that fact in the other party's head, bring it to their attention?

Mr. Stevens: I object to further questions based upon this hypothetical nature, your Honor.

The Court: Objection sustained.

Q. (By Mr. Taylor): Now, on this I believe you testified, Mr. Harkabus, the first paragraph of Government's Exhibit "O," was it you that testified that that is the customary heading that you put on all statements taken from witnesses?

A. I stated that it is in my style, Mr. Taylor, yes.

Q. And is that the statement that you put on there, one that you dictated that to Mrs. Chesser?

A. I testified that I dictated the preamble, Mr. Taylor, because it incorporates all the, that no threats or promises have been made, and the statement can be used in a court of law, which she had been advised of prior to the time that I dictated that.

Q. And did you dictate the greater part of that exhibit, Mr. Harkabus?

A. I testified earlier that certain portions of it for the purpose of clarity that I used my own phraseology in it. However, the substance of the statement was dictated by Miss Casey. [276]

Q. Well, now, Mr. Harkabus, do you know how

(Testimony of Edward J. Harkabus.)

much of a bond that Miss Casey was under at the time, what the bail had been set at to hold Miss Casey in jail? A. I do not.

Q. Did you know that it was ten thousand five hundred? A. I didn't know that.

Q. And you did not make any promises or threats then to Miss Casey? A. I did not.

Q. So then if she testified here that you had promised to release her if she would sign this statement she was in error then; is that right?

A. I never promised Miss Casey anything, Mr. Taylor.

Q. Well, that is not the answer to the question. I say she was in error if she testified to that effect; is that right? A. Yes.

Q. Well, how do you account for the fact, Mr. Harkabus, that the following morning Miss Casey was released without putting up any bond after signing that paper?

A. I want to say without equivocation, Mr. Taylor, that I had nothing to do with the release of Miss Casey. No promises or threats of duress or otherwise were ever made to her by me or anyone else in my presence.

Q. I am asking you then if you have any explanation of why she was released the following morning without putting up any bail? [277]

A. I don't know.

Q. Isn't it unusual for a person to be under a ten-thousand-dollar bail one day and be released

(Testimony of Edward J. Harkabus.)

without any bail the next day, as soon as they get a paper signed they release her. Would that be unusual?

A. Do you want my opinion, Mr. Taylor?

Q. Yes, sir. A. I would say probably.

Q. Now, you remember what hotel Miss Casey said she stopped at in Denver?

A. I don't recall what hotel she said she stopped at, but the card that is in evidence here was the one that she stated Fern and Jack Bennett had stopped at. I believe she said the Westward Ho, something to that effect. That's my recollection.

Q. That is what I was going to ask you if it wasn't the Westward Ho where Marilyn Casey and Mr. Kehert stopped, Westward Ho Hotel?

A. I believe that is what she told me, yes.

Q. And now this other statement that you have here, Mr. Harkabus, the one that was prepared by Mrs. Zimmerman and a stenographer in the office of Mr. Stevens, how did Mrs. Zimmerman happen to prepare that particular statement, if you know?

A. Well, Mrs. Zimmerman typed this and it is excerpts from the first statement that you handed me here, a brief account of the long statement as an affidavit of facts. [278]

Q. And did you furnish the language of this statement, Mr. Harkabus?

A. Let me look at it again, Mr. Taylor.

Q. Because there is some words in there Miss Casey did not know the meaning of and we was

(Testimony of Edward J. Harkabus.)

trying to find out who had furnished the words in that affidavit that is signed by Miss Casey.

A. Well, the story is hers, Mr. Taylor, and I don't know whether, I believe I did dictate this to Mrs. Zimmerman and read it to Marilyn Casey.

Q. Was Marilyn Casey present at the time that you read that, or dictated that to Mrs. Zimmerman?

A. Well, I already had this complete statement furnished by Miss Casey previously and this contains the essence of that statement, Mr. Taylor. And it was read to her, she read it and the Commissioner also asked her if she knew what the contents were.

Q. And where did you go to get Miss Casey, to get her to sign this paper; how did you get her back in?

A. I went to the Village Grill to locate her, Mr. Taylor.

Q. And you brought her in from the Village Grill?

A. She voluntarily accompanied us.

Q. You went out to get her, though, is that right?

A. Yes, she had no transportation.

Q. Well, isn't it a fact that you testified she was driving a Buick car around Fairbanks at that time? [279]

A. I beg your pardon.

Q. Did you testify she was driving a Buick car?

A. I don't recall that I testified as to that.

Q. Possibly Mr. Worsham said so. Then she came in and signed that, although she did not know the meaning of some of the words in it?

Mr. Stevens: I object, your Honor. Mr. Taylor

(Testimony of Edward J. Harkabus.)

is using the plural. I believe she was asked whether or not she knew what the word "cognizant" was. Mr. Taylor is using the plural throughout his whole questioning here, and I wish that he would advise the witness that there was one word that she did not identify.

The Court: I will sustain the objection.

Q. (By Mr. Taylor): Did you explain to her the meaning of the word cognizant?

A. Well, I thought that she was cognizant of the meaning of cognizant.

Q. Well, are you cognizant of the meaning of the word cognizant? A. I believe so.

Q. What is Webster's definition of cognizant?

A. I don't know what Webster's definition of it is, but through usage I think you have knowledge, you recognize it.

Q. That is the Harkabus definition? [280]

A. Well, I haven't completed the balance of my dictionary, Mr. Taylor.

Q. Now, we finally found out who the author of this was, says that, "Norma Jean Crosby drove the aforementioned girls across the Washington-Canadian border with full knowledge that instant girls were going to Alaska to work as prostitutes." Prospectors and prostitutes worked up. What were the "instant girls"? Did you put that word in there? A. Yes, I believe I did.

Q. I think that was one word that Marilyn Casey did not know, too?

(Testimony of Edward J. Harkabus.)

Mr. Stevens: I object to that, your Honor. There has been no testimony like that in this record.

The Court: Objection sustained.

Q. (By Mr. Taylor): Did you—I see you left a blank in here; did you ever find out what word went into that blank space, in a name?

A. If you would show me that, Mr. Taylor. Well, I think it is self-explanatory in the statement, Mr. Taylor. If you will notice, after the blank there is a comma and it states, “whom I have subsequently identified as Carole Ward.”

Q. Do you know where Carole Ward is now?

A. I don't, no, sir.

Q. Now, after you had talked with Marilyn Jean Casey [281] in the office of Mr. Gore, I believe you stated that you took her then down to the office of the FBI?

A. That's correct, yes.

Q. And did you continue your interrogation of Marilyn Casey there?

A. Yes, I did.

Q. And how long did you talk to her there?

A. I don't know exactly, but I would say two or three hours.

Q. Now, wasn't that—isn't it a fact that you talked to Marilyn Casey from around nine or ten o'clock in the morning until five o'clock in the afternoon on the 6th?

A. No.

Q. What?

A. That is not a fact. That doesn't jibe with the times that I gave. I said it was perhaps a half an hour in Mr. Gore's office, and then subsequently

(Testimony of Edward J. Harkabus.)

perhaps two or three hours. I'm not positive of these times, Mr. Taylor.

Q. Did you knock off for lunch?

A. I believe we sent out for lunch.

Q. So that was quite a little chat you were having then?

A. Well, it was a long trip, Mr. Taylor.

Q. Yeah, not too long an affidavit, though. Then after you had talked with Marilyn Jean Casey along sometime in the afternoon, what did you do? [282]

A. I presented the facts to Mr. Gore that I developed to that point and he authorized a complaint be filed against the defendant Mr. Bennett and Mr. Kehert as well as Norma Crosby and Fern Bennett.

Q. And what complaint did you make against Fern Bennett and Norma Crosby?

A. Well, I didn't make the complaint. It was drawn by the United States Attorney's office. I don't know, but it is a matter of record.

Q. And what did you have Mr. Gore charge Mr. Bennett and Mr. Kehert with?

A. I didn't have him charge anybody with anything, Mr. Taylor.

Q. Oh, you didn't?

A. We present the facts, for your information, to the United States Attorney, who makes the decision as to whether or not to issue process.

Q. You then did not make the complaint then?

A. I signed the complaint, yes.

Q. Oh, you signed the complaint. What was the charge against Fern Bennett and Norma Crosby?

(Testimony of Edward J. Harkabus.)

A. I think it was aiding and abetting the transportation of a woman for immoral purpose.

Q. What was the complaint against Mr. Kehert and Mr. Bennett?

A. Well, they were charged, as I recall, with the transportation. [283]

Q. And there was a warrant issued for the arrest of Mr. Bennett and Mr. Kehert? A. Yes.

Q. And what—was a warrant issued for the arrest of Fern Bennett and Norma Jean Crosby?

A. Yes.

Q. And isn't it a fact at the time the warrant was issued for the arrest of Norma Jean Crosby and Fern Bennett that they were in custody?

A. I believe they were, Mr. Taylor.

Q. And isn't it a fact, Mr. Harkabus, that after the warrant for the arrest was issued for Mr. Bennett that Mr. McRoberts found you and told you that Mr. Bennett was being booked at the Federal jail? A. That is not true, Mr. Taylor.

Q. And that he would take him back to his room at the Fifth Avenue so he could come up there and arrest him and search him and the premises?

A. That is not true.

Q. Did you get a telephone call?

A. I did get a telephone call from Mr. McRoberts, yes.

Q. That he had Mr. Bennett in custody?

A. No.

Q. What was the telephone call in essence?

A. In essence the conversation was that Mr.

(Testimony of Edward J. Harkabus.)

Bennett was at Room 404 in the Fifth Avenue Hotel Annex, and I told [284] Mr. McRoberts that I was in the process of securing a warrant for Mr. Bennett at that time.

Q. And did Mr. McRoberts call from the Colonial Annex?

A. I don't know where he called from, Mr. Taylor.

Q. And did you know, or did you afterwards ascertain that prior to the time that you issued the warrant that Mr. Bennett was being processed into the jail here? A. I didn't.

Q. That he was arrested at the same time that Fern Bennett and Norma Crosby was arrested?

A. I didn't know that he had been, Mr. Taylor.

Q. You didn't know that?

A. No, I did not. I don't believe he had.

Q. You didn't know that Mr. Bennett was brought to the jail the same time as his wife and Norma Crosby?

A. Mr. McRoberts didn't indicate that to me in his conversation. He said he had no process for Mr. Bennett.

Q. Well, does Mr. McRoberts always have to have a process to arrest somebody?

Mr. Stevens: I object to that. That calls for an opinion of the witness. Also, I believe Mr. Taylor is stating certain things which he wishes to state he should put himself under oath.

The Court: Objection sustained.

Q. (By Mr. Taylor): Now, after you got the

(Testimony of Edward J. Harkabus.)

warrant you went then to the Fifth Avenue Hotel; is that right? [285] A. The Annex, yes.

Q. And who went with you?

A. Agent Worsham was with me.

Q. And when you got there, who was in the room? A. Mr. Bennett and Mr. McRoberts.

Q. Now, how did Mr. McRoberts happen to bob up on the scene?

A. I don't know. He was there.

Q. Did he have a warrant?

A. I had a Federal warrant for Mr. Bennett.

Q. And what, if anything, did you do when you entered the room?

A. I identified myself to Mr. Bennett as an agent of the FBI, told him I had a warrant for his arrest, that he did not have to make a statement, that any statement he did make could be used against him, that he was entitled to the service of an attorney. I read the warrant to him in its entirety.

Q. Now, at the time that you left the Federal building then, Mr. Harkabus, you knew where Mr. Bennett was, did you not?

A. I knew where he was from what Mr. McRoberts had told me.

Q. And did you when you left the Federal building know that you were going to search his room?

A. I knew I was going to serve the [286] warrant.

Well, as a matter of policy, we made a search incidental to a lawful arrest.

(Testimony of Edward J. Harkabus.)

Q. Could you not have secured a search warrant at the same time you secured the warrant of arrest?

A. On what grounds, Mr. Taylor?

Q. Well, what ground did you search the room?

Mr. Stevens: I object to that, your Honor. I believe the question of the validity of this search has been decided by the Court.

The Court: Well, I think so, too. Everything has been gone into, just a repetition on that particular subject.

Q. (By Mr. Taylor): Now, what was the extent of your search of the room occupied by Mr. Bennett?

A. Well, after I informed Mr. Bennett that he was under arrest I searched his person and found a wallet with the gas coupons in it, and there was money in the wallet, so in Mr. Bennett's presence this money was counted out in the presence of Mr. McRoberts and Mr. Worsham and myself, and as I recall it amounted to eight hundred eighty some odd dollars, eight hundred eighty-three and a few odd cents, and the receipt was to be given. Mr. McRoberts said that he would give Mr. Bennett a receipt when he got over to the Federal jail for these items, and there was a 38, or 380 Spanish revolver that was taken at that time and a 22 caliber Winchester rifle from Mr. Bennett's [287] possession.

Q. And now you arrested Mr. Bennett though, yourself, did you not, Mr. Harkabus?

(Testimony of Edward J. Harkabus.)

A. I was accompanied by Special Agent Worsham and Mr. McRoberts was there.

Q. And you were the one that took the gas coupons, were you not? A. Yes.

Q. Now, isn't it a proper procedure, Mr. Harkabus, for you serving a Federal warrant to give the defendant a receipt for the property that you take?

A. Well, under most conditions it is turned over to the Marshal and in view of the fact that the Marshal was there and said that he would issue a receipt, I saw no need for it, Mr. Taylor.

Q. And isn't it a fact that when you take the things from the room, if there was nobody there you would leave a receipt in the room?

Mr. Stevens: I object to that, your Honor. That is not even involved in the issues before the Court.

Mr. Taylor: I am just asking what the procedure is, your Honor. I think it is perfectly permissible here.

The Court: You are talking about the law in regard to a search warrant?

Mr. Taylor: No, sir, I am talking about the procedure of when property is taken of giving a person from whom it was taken a receipt. [288]

The Court: I think the receipt comes in on the Search Warrant.

Q. (By Mr. Taylor): Now, who got the twenty coupons? A. Pardon?

Q. Who took the, got the twenty gas coupons?

A. Well, I believe Mr. McRoberts had them, and I secured them from him.

(Testimony of Edward J. Harkabus.)

Q. Isn't it a fact that when you went in there——

A. I had them.

Q. That they were laying on top of the dresser at the time you went into the room?

A. I don't believe that is correct, Mr. Taylor.

Q. And now, after you had put Mr. Bennett in jail, where did you go then?

A. Well, later that evening I arrested Mr. Kehert.

Q. Now, just before we go any further, what time was it you went to Mr. Bennett's room?

A. I went into Mr. Bennett's room at 5:01 p.m., on July 6th.

Q. And did you see any evidence of a woman being there? A. Yes.

Q. And did you know that Mrs. Bennett was occupying that room? A. No, I did not. [289]

Q. Have you since found out that Fern Bennett was there with her husband? A. I have not.

Q. Well, isn't it a fact, Mr.——

A. Perhaps I can clear that up for you, Mr. Taylor. I testified earlier today that when I talked to Mr. Bennett he said that he was alone there, and then I noticed some women's unmentionables in the bathroom and asked him if he was wearing those, and he said no, that he wasn't, that the girls from next door had come in to do some washing.

Q. When did you find out Mrs. Bennett was in town? A. I beg your pardon.

Q. When did you find out that Mrs. Bennett had come in town with Mr. Bennett?

(Testimony of Edward J. Harkabus.)

A. Well, Mr. Bennett didn't say that she had come in town with him. He said they had met on the highway coming up.

Q. How is it then, Mr. Harkabus, before you went there you had a Warrant issued for Fern Bennett?

A. Well, I knew she was in town.

Q. Oh, you knew she was in town?

A. Well, she was arrested. You asked me that earlier, Mr. Taylor.

Q. So you naturally assume that those garments were Mrs. Bennett's garments, wouldn't you, these unmentionables, panties and bras and stuff like that? [290]

A. You are asking me for an assumption. I wouldn't assume that.

Q. Well, did you take, did you seize those clothes, too, the woman's clothes that were there?

A. I didn't, Mr. Taylor.

Q. Didn't somebody take the clothes and take them to the jail?

A. I believe Mr. McRoberts did.

Q. And they are still in jail, are they not, in the Marshal's care?

A. I guess so.

Q. Now, at the, after taking Mr. Bennett to jail, you say you went to arrest Mr. Kehert; what time was that arrest made?

A. That was made at nine, perhaps I can fill you in on the time. We allowed Mr. Bennett to take his two dogs to the vet because he had no place to leave them and that took a little time to get down there, and I believe that Mr. Bennett was, arrived at the Federal jail at a little after six, sometime after six.

(Testimony of Edward J. Harkabus.)

The booking sheet would show the exact time, Mr. Taylor.

Q. Now, you turned him in then a little after six then? A. I'm not positive of that.

Q. Well, approximately that?

A. I would say that we had a very brief interview with Mr. Bennett for about fifteen or twenty minutes from about [291] 6:05 to 6:30, and I think perhaps it was around 6:30 that he was booked. I'm not sure.

Q. In that interview, did you inform him of his rights?

A. I advised him as I previously told you that he had the right to have an attorney, that he didn't have to make a statement, that any statement he might make could be used against him.

Q. And you have no statement of Mr. Bennett here to introduce in evidence? A. I have not.

Q. And about nine o'clock you went up to Mr. Kehert's room?

A. At the Transient Rooms, yes.

Q. Where is that located?

A. That was located on South Cushman.

Q. About how far out?

A. Near, somewhere near the Trail's End Motel, I believe. I don't know what the, sixteenth, perhaps. It burned down last summer.

Q. Oh, it has burned since then? A. Yes.

Q. What room did you go to?

A. Room Number 4.

Q. And who was there?

(Testimony of Edward J. Harkabus.)

A. Mr. Bennett—or Mr. Kehert was there.

Q. And how did you gain admission? [292]

A. I rapped on the door, identified myself as a Federal agent.

Q. From the outside?

A. From the outside, and when he opened the door, I entered.

Q. In what manner did you enter?

A. I walked. How do you mean, Mr. Taylor?

Q. I mean what, if anything, did you have in your hand?

A. I had a .38 snub nose in my hand, Mr. Taylor.

Q. And pointed at Mr. Kehert?

A. Yes, sir, because Miss Casey had informed us that he carried a gun, and he had a previous arrest for assault with a deadly weapon.

Q. You found out afterwards that?

A. Oh, I knew that before.

Q. That there was no conviction of any previous?

A. No.

Q. But did you know that before then that there was no conviction on that charge?

A. Pardon?

Q. Did you know before that there was no conviction on that charge?

A. That there was no conviction you say?

Q. Yeah?

A. Well, no, maybe I just read as far as seeing the arrest of assault with a deadly weapon. [293]

Q. No gun though?

(Testimony of Edward J. Harkabus.)

A. I beg your pardon?

Q. You didn't find a gun?

A. I didn't find a gun, no.

Q. Then you handcuffed Mr. Kehert?

A. Yes, I did.

Q. And then you proceeded to search the room?

A. Well, prior to that time I holstered my gun before I handcuffed him, of course, and then I did handcuff him, which isn't unusual when you are arresting a man.

Q. Well, isn't that kind of uncalled for if a man is not making any effort to resist arrest?

A. Well, he had made no effort to resist, but sometimes it acts as a deterrent effect.

Q. Maybe it would be more so if you had put leg irons on him? A. No.

Q. That would have deterred him, wouldn't it?

A. I am not familiar with leg irons. I never used them.

Q. And then what did you do then after you got him shackled? A. After I handcuffed him?

Q. Yeah.

A. Well, he sat down on a chair. It was a rather small room and to the best of my recollection Mr. Worsham [294] found the camera which we were, had been informed by Miss Casey that it was her property, along with the film which I have previously identified here, and the post card there, I believe.

Q. And now, who found this post card?

A. Mr. Worsham, I believe, found that.

(Testimony of Edward J. Harkabus.)

Q. So if Mr. Worsham testified that you found it, he would be wrong?

Mr. Stevens: I object to that, your Honor. There is no such testimony in the record.

The Court: Objection sustained.

Mr. Taylor: I beg your pardon. There is that testimony.

Q. (By Mr. Taylor): Now, you stated that you took Mr. Kehert to jail then? A. Yes.

Q. And what else did you take besides the camera and film and the card? I believe you had a paper bag, did you not?

A. Oh, yes, yes, from Denver.

Q. Anything else?

A. Not that I took, no. There were some clothes there that belonged to Miss Casey I previously testified.

Q. Did you take them?

A. No, I didn't take them. [295]

Q. Well, why did you take Miss Casey's camera then? A. You said why?

Q. Yeah?

A. Well, as a search incidental to the arrest, took it as evidence.

Q. As a search incidental to an arrest you can take the property of the person being arrested, can you not?

A. We asked him who the camera belonged to. He said it was his. She said it was hers.

Q. Isn't it a fact that at the preliminary hearing held before Mrs. Nordale last fall you testified

(Testimony of Edward J. Harkabus.)

that the camera and the pictures were Mr. Kehert's taken them from Mr. Kehert's?

A. We took them from the room.

Q. I am asking you if you did not at the preliminary hearing testify that you took the camera and the films from Mr. Kehert. You attempted to introduce them as taken from Mr. Kehert?

A. I don't recall that, Mr. Taylor.

Q. Now, you were present, I believe, at the preliminary hearing held before Mrs. Nordale at which time the hearing in the case of United States vs. Mr. Bennett, Mr. Kehert, Jean Crosby, and Fern Bennett was heard, was held?

A. Yes, I was there.

Q. What was the outcome of that hearing?

Mr. Stevens: I object to that, your Honor. [296]
The case has now gone through grand jury and the result of a preliminary hearing is immaterial to the issues before this court.

Mr. Taylor: I think it is pertinent, your Honor. I will connect that up in just a moment or two, too.

The Court: Very well.

Q. (By Mr. Taylor): Isn't it a fact that Mrs. Nordale held there was no probable cause and discharged the defendants and their bondsmen?

A. The facts as I recall them, Mr. Taylor, was that it was postponed when I was present at the preliminary hearing, and any action taken subsequent to that. It was postponed because of the illness of Miss Casey. That is my recollection.

(Testimony of Edward J. Harkabus.)

Q. Were you not there, Mr. Harkabus, at the time Miss Casey appeared and testified?

A. I was not there.

Q. Who was there at that time?

A. I don't know. I wasn't there. How could I know?

Q. Well, at the time that you appeared at the preliminary hearing, where was Miss Casey?

A. I believe Miss Casey plead illness at that time when I was there.

Mr. Harkabus: Your Honor, I think we could settle this by getting the Commissioner's records, rather than going on my recollection. [297]

The Court: We can handle it right here, I think, if we can.

Q. (By Mr. Taylor): Well, do you know, Mr. Harkabus, that prior to the convening of the grand jury that brought in the Indictment that these defendants, all four of them, were discharged, the case was dismissed against them?

A. Yes, I knew that. Not of my own knowledge, but I had heard about it.

Q. And during that interval between the time that this case was dismissed and the convening of the grand jury, you still had the property that had been taken from Mr. Kehert and Mr. Bennett in your possession, or the United States, in its possession?

A. I don't know about that, Mr. Taylor, because I didn't have that case. I was in Anchorage at that time.

(Testimony of Edward J. Harkabus.)

Q. And did you know that the guns that was taken from Mr. Bennett was returned to Mr. Bennett?

A. I did not, because I had nothing to do with the guns.

Q. You didn't; didn't you see the guns?

A. The guns were turned over to the Marshal in Mr. Bennett's presence.

Q. And were you present at the time that the camera and the pictures were introduced in evidence in the grand jury? [298] A. Yes.

Q. And did you know that even after the discharge of these defendants that those items had been held by the United States Marshal over the objections of Mr. Bennett and Mr. Kehert when they were discharged?

A. Well, I didn't know what the status of that case was at that time, Mr. Taylor.

Q. You remember when you appeared before the grand jury? A. Yes, I do.

Q. What was the date?

A. I don't recall the date offhand.

Q. Would that be around November 24th?

A. That could be.

Mr. Taylor: Could we have a short recess, your Honor?

The Court: Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. [299]

EDWARD J. HARKABUS

the witness on the stand at the time the recess was taken, resumed the stand for further cross-examination.

By Mr. Taylor:

Q. Mr. Harkabus, am I right in assuming that you testified here on direct examination that you saw Marilyn Casey in August sometime at your office?

A. Yes, I believe that is correct, Mr. Taylor.

Q. And did you see her on November the 21st, 1953? A. Yes.

Q. A few days before the grand jury indictment was returned?

A. Yes, I testified to that this morning.

Q. That is where I got that date.

A. Yes, I believe that that date is correct. I gave it as an approximate date.

Q. And then in August, this August meeting you had with Marilyn Casey you say that was at the residence of either Ed Gines or Nels Robinson?

A. No. I believe that I stated that I saw her during August again in order to get more corroborating data, but that I was with Agent Worsham on one occasion, the date of which I cannot recall, at

(Testimony of Edward J. Harkabus.)

the residence of Ed Gines. And that was at the request of Mr. Stevens to see where she was, to locate her.

Q. Now, you testified here something about she had [300] given you some, a description of, I believe, some clothing that belonged to somebody else. Now, what was that?

A. Clothing that belonged to somebody else?

Q. Yeah, I think the clothing of the other girls that came up at the same time she did in the car? You said something, she had given you a description of what they were wearing, that would be on July the 6th, though?

A. I don't recall that, Mr. Taylor, and I don't believe that I testified to that on direct.

Q. I made a note of it, what clothing she had described some clothing?

A. That was her personal clothing is what she was talking about, or at least what I was talking about.

Q. Perhaps I was wrong then in assuming that she was describing the clothing of these others, of Norma Crosby and Mrs. Bennett, but you think she was describing some clothing that she had in the room?

A. That's correct, that is what she stated to me.

Q. Now, I believe you also identified a couple of keys here. Now, what room was Mr. Bennett in?

A. 404.

Q. And it would be natural that he would have

(Testimony of Edward J. Harkabus.)

a key to that room, would it not? A. Yes.

Q. And you know whether his wife was in 404, or 405? A. Do I know? [301]

Q. Yeah?

A. All I know is what Mr. Bennett told me, that he was in there alone and that the girls next door came over to do washing.

Q. Now, you attributed a statement to Marilyn Casey at one time you was talking to her, I believe it was in August, and that she made the statement that she couldn't fabricate her testimony or statement; is that the exact words that she used, that she would be unable to fabricate it?

A. Well, she didn't use the word fabricate.

Q. That was the word you used then, is that right? A. Yes. She said lie.

Mr. Taylor: I believe that is all.

Redirect Examination

By Mr. Stevens:

Q. Now, Mr. Harkabus, in response to a question by Mr. Taylor concerning this preliminary hearing, you said you had heard that the charges were dismissed against these defendants as a result of the preliminary hearing? A. Yes.

Q. I believe you also testified that you appeared at the preliminary hearing? A. Yes.

Q. Now, did Miss Casey appear on the day that you appeared, Mr. Harkabus?

A. She did not. I said that she was ill, or I at-

(Testimony of Edward J. Harkabus.)

tempted to locate Miss Casey and she was sick at that time and [302] couldn't appear, as I recall.

Q. And do you recall whether or not that preliminary hearing was continued at my request?

A. I believe that it was, but I was only there one day, perhaps two days, but it wasn't completed. That's my recollection at that time.

Q. Then you did not appear the day Miss Casey appeared when the hearing was continued to a later date? A. No, I did not.

Q. Well, since you have told Mr. Taylor that you did hear why it was, that the case against the defendants was dismissed, did you hear why the case was dismissed against them?

A. Well, it was my own knowledge. I didn't know anything about the dismissal.

Q. No, but you told Mr. Taylor, did you not, that you had heard that it was dismissed? A. Yes.

Q. Did you hear at the same time why it was dismissed? A. Yes.

Q. Will you tell us what you heard in regard to why it was dismissed?

A. Well, I understand that you, it was discontinued at your request, that the preliminary hearing was.

Q. And did you learn why that was, Mr. Harkabus?

A. I believe because Miss Casey was uncooperative as a witness. [303]

Q. Now, Mr. Harkabus, did you force Miss Casey to go downstairs in this building to your office on

(Testimony of Edward J. Harkabus.)

the 6th day of July, 1953? A. I did not.

Q. But she was downstairs with you and Mr. Worsham at least two or three hours?

A. Yes.

Q. And that was on the 6th day of July?

A. Yes.

Q. And do you know when she was arraigned on the charge which was filed against her under Territorial Law, of your own knowledge?

A. No, I don't.

Q. She was with you the early part of the afternoon on that day? A. Yes.

Q. And Mr. Harkabus, did you have any knowledge of the amount of bond that Miss Casey was being held under?

A. I did not. It had no connection with any of the bureau's functions.

Q. But did she object to you about the amount of any bond, or did she mention at all to you any bond?

A. She did not.

Mr. Stevens: Your witness, Mr. Taylor. [304]

Recross-Examination

By Mr. Taylor:

Q. Mr. Harkabus, isn't it a fact when Miss Casey came up to your office that she was brought up there by the United States Marshal, brought there out of jail?

A. She wasn't brought to my office out of jail, Mr. Taylor. As I said before, she was in the United States Attorney's office when I arrived.

(Testimony of Edward J. Harkabus.)

Q. And then after you got through questioning her along in the afternoon, what did you do with her; just let her out the door of your office?

A. No, I never do that with someone else's prisoner.

Q. Oh, you knew she was a prisoner, then?

A. I beg your pardon.

Q. You took her back up and put her in jail, is that right, or give her to the Marshal?

A. I caled the Marshal.

Q. Who took her down there though to your office?

A. She walked down with us.

Q. Oh, she went down with you?

A. Yes.

Q. You and Worsham?

A. Yes.

Q. Now, you stated in response to a question by Mr. Stevens that you were not present at the time that Miss Casey testified at the preliminary hearing? [305]

A. That's correct.

Q. Where were you on the 21st day of October, 1953?

A. Is that the date of the preliminary hearing, Mr. Taylor?

Q. I am asking you the questions, Mr. Harkabus. It was though. That was the 21st.

A. I was at the preliminary hearing the first day, but I was not at the preliminary hearing because it had been postponed when Miss Casey was there. The evidence was turned over to the United States Attorney and then that was it. I had to go back to Anchorage. I was assigned there.

(Testimony of Edward J. Harkabus.)

Q. Isn't it a fact that you testified that first time you came to the preliminary hearing?

A. Yes, I did.

Q. You offered your testimony?

A. I testified at the first preliminary hearing.

Q. And you put these pictures and films in evidence?

A. They were not admitted in evidence, as I recall.

Q. At the preliminary hearing Mrs. Nordale did admit them, did she not?

A. I don't believe so, Mr. Taylor.

Q. And the coupons, the gas coupons, weren't they marked as exhibits or marked for identification or introduced as exhibits?

A. Yes, they were at that time.

Q. Either one of the two? [306]

A. One or the other, I don't know which.

Q. And then when did you learn that the case had been dismissed by Mrs. Nordale?

A. Just by hearsay. In fact, I read it in the newspaper, I believe.

Q. Then later you were called then to testify before the grand jury in this case, this same case then?

A. Yes, that is correct.

Q. That is, but the Indictment these people are being tried on now returned?

A. Yes, I guess so.

Q. So there was considerable time then between the dismissal of the case by Mrs. Nordale and the

(Testimony of Edward J. Harkabus.)

bringing of the Indictment by the grand jury, was there not?

A. I don't know when it was dismissed exactly, Mr. Taylor, because I wasn't there.

Mr. Taylor: I believe that's all, Mr. Harkabus.

(Witness excused.)

Mr. Stevens: Your Honor, again I request the court to allow me to call Mrs. Nordale. Mr. Taylor is doing a lot of testifying here and I believe she could straighten up quite a few points.

The Court: Well, I think it is the duty of the attorney to keep a lookout and see that witnesses don't get in the courtroom. I don't care to withdraw the rule. [307]

C. M. WRIGHT

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. C. M. Wright.

Q. Mr. Wright, will you tell us where you resided during the months of, between say April and July of 1953?

A. Odessa, Texas.

Q. And what was your profession at that time?

A. A Special Agent for the Federal Bureau of Narcotics.

Q. Do you know Mr. Bennett who is the defendant in this case?

A. Yes, sir.

(Testimony of C. M. Wright.)

Q. Where did you meet Mr. Bennett?

A. In Odessa, Texas.

Q. Do you remember approximately when you met him?

A. I believe the first time I met him after I got my assignment was April the 4th, around there.

Q. And did you make yourself known to Mr. Bennett as a Special Agent for the Bureau of Narcotics?

A. No, sir, I did not.

Q. And why was that, Mr. Wright?

Mr. Taylor: Could I interrupt just a moment. April the 4th of what year?

Mr. Wright: 1953. [308]

Q. (By Mr. Stevens): And why was that, please?

A. Because my assignment was—— (Interrupted.)

Mr. Taylor: Just a moment, your Honor. I am going to object to any testimony as to what his assignment was, made upon suspicion that somebody might have been committing a crime. I think the District Attorney should make an offer of proof of that, what he is expecting to prove by this matter.

The Court: I think Mr. Taylor is correct.

(Thereupon, the attorneys approached the bench, and the following proceedings were had out of the hearing of the jury.)

Mr. Stevens: Your Honor, the government offers to prove by this witness that between the time this witness met Mr. Bennett and the time Mr. Bennett came to Alaska he was working as an undercover

(Testimony of C. M. Wright.)

Agent for the Federal Bureau of Narcotics. He was posing as a friend of Mr. Bennett's and had many conversations with him relating to the crime before the court which does not discuss narcotics or any discussion relating to narcotics. Our discussion would be purely relating to the crime before this court, transportation for the purpose of prostitution.

The Court: Well, did the conversation take in anything that is relevant?

Mr. Stevens: Yes, it is. [309]

The Court: Did it take in any admissions of guilt?

Mr. Stevens: We shall offer testimony that Mr. Wright actually discussed this trip to Alaska with Mr. Bennett and the other defendants.

Mr. Taylor: Of course, your Honor, we object to it unless it specifically had to deal with the transportation of Marilyn Casey to Alaska.

Mr. Stevens: It has to do specifically with this trip, your Honor.

The Court: Objection overruled.

(The attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

Q. (By Mr. Stevens): Mr. Wright, calling your attention to sometime in May of 1953, did you have occasion to take any type of trip with Mr. Bennett?

A. Yes, sir.

Q. And where did you take this trip to?

A. I met, myself and Federal Agent Pizzeni met

(Testimony of C. M. Wright.)

Jack Bennett and Carolyn Wright in Amarillo, Texas.

The Court: Jack Bennett you speak of, is he the defendant in this case?

Mr. Wright: Yes, sir.

Q. (By Mr. Stevens): And who else was with you at that time?

A. Federal Agent Herman Pizzeni and Jack Bennett, myself and a woman that was introduced to me as Carolyn Wright. [310]

Q. And where were you at the time?

Mr. Taylor: Just a moment. Could I interrupt?
Carolyn Who?

Mr. Wright: Carolyn Wright.

Mr. Taylor: Wright?

Mr. Wright: Yes, sir.

Q. (By Mr. Stevens): And where were you at the time?

A. At the Mink Club in Amarillo.

Q. And at that time did you have a discussion with the defendant, Jack Bennett?

A. Yes, sir.

Q. What was that discussion?

A. Well, our discussion was—— (Interrupted.)

Mr. Taylor: Now, just a moment. Just a moment. I am going to object unless this is actually in the exact words and what was said by you and what was said by Mr. Bennett.

Mr. Wright: All right.

Mr. Stevens: Just a moment, Mr. Wright, please.
Mr. Taylor makes his objections to the court.

(Testimony of C. M. Wright.)

Mr. Taylor: I am objecting to him making any narrative statement of this, your Honor, but should testify exactly as to the conversation, what was said by each of the parties. [311]

The Court: I think you should direct this to the incident that we have before the court in some form so it won't take in too much scope.

Mr. Taylor: Furthermore, your Honor, I am going to object to any testimony, any testimony that does not concern Marilyn Casey. The crime charged in this indictment is the transportation of Marilyn Casey and a mere conversation prior to that as to any general trip, your Honor, would not have anything, any bearing upon this case now before this court.

Mr. Stevens: Your Honor, the government is prepared to bring this, to bring before this court cases which have been decided which state that all activities of the defendants in a case such as this for a reasonable period of time both before and after the trip alleged, are relevant to the charge before the court in order that the jury may decide the issue of purpose or motive involved in this charge before the court, and we believe this testimony in regard to all the activities of Mr. Bennett within a reasonable time and we have limited it to the month of May, a reasonable time before the trip began, and we believe that all the testimony regarding his activities in Texas and his activities after he arrived in Alaska would be relevant.

(Testimony of C. M. Wright.)

The Court: Proceed.

Q. (By Mr. Stevens): What was that [312] discussion?

A. Well, now to answer that question correctly, I would have to go back to that morning when I explained the reason we were meeting there to begin with.

Q. Proceed.

A. We were to meet Jack Bennett in Amarillo that night at the Mink Club in order to purchase three ounces of heroin. However——

Mr. Taylor: Just a moment. I am going to have to move that the answer be stricken as not responsive to the question, that the jury be directed to disregard the same.

The Court: It may be stricken. The jury will disregard all stricken evidence, including this.

Mr. Stevens: Please confine your testimony, if you can, to just the charge before the court which is transportation for the purpose of prostitution.

Q. (By Mr. Stevens): You had a discussion with him there?

A. Yes, sir. I had a discussion with Jack Bennett that morning and he told me at that time that he had to go to Pampa in order to pick up a prostitute that he was——

Mr. Taylor: What date was that, Mr. Wright?

Mr. Wright: That was on May 15th, 1953.

Mr. Taylor: Just a moment. I am going to object to any testimony unless this witness can testify that the party, that the prostitute to be picked up

(Testimony of C. M. Wright.)

was Marilyn Casey. [313] I don't think that a general statement of this—your Honor, Mr. Stevens made a statement I would like to see him back up with a little law. I would like to have the jury dismissed and let Mr. Stevens bring a statement in here, some law in here that you can bring in evidence of other related offenses.

Mr. Stevens: We have no objection, your Honor, if Mr. Taylor wants a little law.

The Court: You have the authorities there?

Mr. Stevens: I have them right here, yes, sir. Case of Aplin—

Mr. Taylor: Your Honor, I asked that the jury be excused.

The Court: The jury will be excused until called to return to the courtroom.

(Thereupon, the jury withdrew from the courtroom.)

Mr. Stevens: In the case of Aplin vs. United States, 41 Federal 2nd, 495—it is a Ninth Circuit Case decided in 1930, your Honor, involving transportation from Salem, Oregon, to Chico, California. The court held that the prosecution could show the illicit relations of the defendant and the victim in Oregon before their departure, and the relations in the course of the trip and stated, “From these facts and circumstances, the jury might well infer that at least one purpose of the transportation was debauchery, or other immoral purpose.” [314]

In the case of Lawrence vs. United States, 162

(Testimony of C. M. Wright.)

Federal 2nd, 156, a Ninth Circuit Court Case in 1947, a case involving the same act before this court, the court held that the evidence tending to connect the appellant with the commission of other crimes was admissible to prove intent, and in that case it was shown that the appellant, the defendant in that case, had in fact transported another girl and they allowed the evidence of that, the transportation prior to the time of the charge in the Indictment so that the jury could weigh that testimony for the purpose of determining whether or not the motive of the defendant was shown in the case.

The most recent case, and the best case on this subject, your Honor, is Dunn vs. United States, a Tenth Circuit Case in 1951 under the same act again, and the court stated "The necessary intent, purpose, and motive on the part of the accused may be proved by circumstantial evidence. And as bearing upon that essential element of the offense, the conduct of the parties within a reasonable time before and after the transportation may be taken into consideration."

Mr. Taylor: If the court please, I am certainly at a loss to see where any one of these three cases that is cited by Mr. Stevens from some cards he has got here, not from any law books I can see, are applicable in the case. Now, in the case where there was a transportation from Oregon to San Francisco, the fact that there was an illicit relationship between the man and the woman before they left [315] Oregon when they got to Frisco, is certainly not anal-

(Testimony of C. M. Wright.)

ogous to this case at bar where they are trying to bring in something that a man expressed an intent to go some place else a month before and get a girl. We don't know whether he went down there or not. That case is sure out the window; and then on the next case, Dunn vs. United States, the Ninth Circuit Court case, I don't know just what it was. It says there was no evidence of other transportation, your Honor.

Now, of the same parties, the second case is entirely foreign to this one and the one in Dunn vs. United States which he says is the one, the clincher in this matter, your Honor, it says circumstantial, but it is conduct of the parties. In this case it would be the conduct of these defendants and Marilyn Casey, and not the conduct of these defendants with somebody a month ahead of time. I can't see where you can let the bars down and let evidence of related crimes a long time before and maybe afterward than any proof or part of proof in this case.

If the parties were the same I would say those cases might be analogous, your Honor, and they might be persuasive, but not under the circumstances in this case, because those cases there, your Honor, two of them was where the same parties were involved, the same man and the same woman, so it wouldn't be a case that would be in point here. This man is trying to say that months before, a month or two months before Jack Bennett said he was go-

(Testimony of C. M. Wright.)

ing some place and [316] that is all there is to it. We don't think that is permissible.

The Court: The objections are sustained. Now, let's see. Just a moment. The objections of Mr. Taylor as to the question just put to this witness is not.

Mr. Stevens: Yes, that is correct.

The Court: The objection is overruled. You may go ahead in accordance with the authorities you have read.

Mr. Stevens: Very well.

Mr. Taylor: Your Honor, I am a little confused on the court's ruling. Did the court sustain my objection?

The Court: No, I did not. Just the opposite. I overruled your objection.

(The jury re-entered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well. Proceed.

Q. (By Mr. Stevens): Now, Mr. Wright, did you see the defendant, Jack Bennett, again, very soon after the 15th of May, 1953?

A. Yes, I saw him May the 18th.

Q. And where did you see him that time?

A. In Odessa, Texas.

Q. And was there anyone with him at that time? [317]

A. Yes, sir.

(Testimony of C. M. Wright.)

Q. Who was with him then?

A. This woman that was introduced as Carolyn Wright.

Q. And what did you do at that time?

A. Well, Jack Bennett and myself, we drove to Big Springs.

Q. Is that Big Springs, Texas?

A. Big Springs, Texas, yes, sir.

Q. And was there anyone with you at that time?

A. No, sir.

Q. And what time of day did you go to Big Springs?

A. It was in the afternoon. I would say approximately one o'clock, somewhere in that neighborhood.

Q. And did you have a conversation with Mr. Bennett as you drove to Big Springs?

A. Yes, sir.

Q. Will you tell us that conversation, please?

A. Jack was talking to me about, that the time before that he had been to Anchorage, Alaska, and——

Q. Please confine yourself only to the issue before this court.

A. Yes, sir. Let me see—and he told me that day——

Mr. Taylor: Now, just a moment. I am going to have to object unless you lay the foundation as to when he was in Alaska prior to that conversation.

Mr. Stevens: Just a moment. Mr. Taylor addresses his objections to the court. You don't have to answer his questions. [318]

(Testimony of C. M. Wright.)

The Court: Objection will be overruled.

A. At that time Jack Bennett told me that he thought that he was going up take his girls back up to Anchorage, and he told me how much money he could make up there.

The Court: Who could make?

Mr. Wright: That Jack Bennett could make through the girls that he would take up there, and he revealed to me some of the things that happened at his prior time, trip to Anchorage.

Q. (By Mr. Stevens): Did you see the other defendants in this case, either Norma Crosby or Betty Bennett or the gentleman seated at the end of the table on that day?

A. Yes, after, when we returned from Big Springs.

Q. By what name do you know the gentleman at the end of the table? A. Steve Williams.

Q. And where did you see these other people?

A. At Jack Bennett's apartment there at the Arrowhead Courts in Odessa.

Q. What time was that?

A. It was rather late in the afternoon, after we had completed our trip to Big Springs and back.

Q. And did you have a discussion with all of these people at that time? [319]

A. I had a discussion with all of them but Steve Williams. When we returned to Odessa, Jack Bennett and Carolyn Wright and Norma (I can't remember her last name) and Betty Bennett were all there at the apartment.

(Testimony of C. M. Wright.)

Q. About what time was it that you returned?

A. It was somewhere around five o'clock.

Q. And what was the conversation you had at that time with all these people?

A. Well, at that time, why after we come back to Big Springs Jack was talking in there to them, and was telling them how much money that could be made in Alaska.

Q. Where did you see Mr. Williams?

A. While we were talking he drove up in a laundry truck.

Q. Where did he get the laundry truck?

A. That I don't know. It was Odessa Steam Laundry truck.

Q. Now, did you make any other trips with Mr. Bennett? A. Yes, sir, I did.

Q. When did you make another trip with him?

A. I believe it was May the 20th. I believe we made a trip to Lubbock.

Q. Is that also 1953? A. Yes, sir.

Q. And who was with you at that time?

A. Norma, the red-headed girl.

Q. And what time did you go? [320]

A. We left Odessa about two-thirty in the afternoon.

Q. Would you describe Norma's appearance on that day?

A. Yes, sir. She had one black eye. It was swollen nearly shut, and one side of her face was bruised very badly with a long scratch down it.

(Testimony of C. M. Wright.)

Q. Did you ask her how this appearance came about? A. Yes, sir.

Mr. Taylor: We object, your Honor, incompetent, irrelevant and immaterial, would have no bearing on this case.

The Court: How is that admissible?

Mr. Stevens: It is a conversation he had with one of the defendants, your Honor, concerning their activities before they came to Alaska.

The Court: Well, this isn't a conversation now describing—— (Interrupted.)

Mr. Stevens: My question, your Honor, I asked this witness whether or not he asked Norma how her physical appearance came about, what caused it.

The Court: Well, offhand I can't see the relevancy. If you want to make an offer to show it is relevant, I will hear it.

Mr. Stevens: Very well.

(At this time the attorneys approached the bench, and the following proceedings were had out of the hearing of the jury.)

Mr. Stevens: Your Honor, the offer is that [321] the answer by the defendant Crosby was that she told this witness that she had been worked over by Jack Bennett because she had been prostituting for nothing, and that after Mr. Bennett got out of the car the conversation continued and that she, the defendant Crosby, discussed prostitution openly and freely with this witness.

Mr. Taylor: I think that would be highly preju-

(Testimony of C. M. Wright.)

dicial, your Honor, don't go to prove any of the material allegations of the Indictment.

Mr. Stevens: It does show the purpose for which they transported this girl to Alaska. That is what we brought this witness before the court for.

The Court: I will sustain the objection.

Mr. Stevens: Very well.

(At this time the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

Q. (By Mr. Stevens): Now, calling your attention to about the middle of June, were you still seeing Mr. Bennett at that time? A. Yes, sir.

Q. Did you see Mr. Bennett and the other defendants at approximately that time?

A. Yes, sir, I did.

Q. And when was that?

A. I believe it was about the 18th of June, [322] 1953.

Q. And where was that?

A. At Jack Bennett's apartment.

Q. Where was the apartment that time?

A. At the Arrowhead Courts in Odessa, Texas.

Q. And did you have a discussion with these people again at that time? A. Yes, sir.

Q. And what time was it?

A. It was in the afternoon.

Q. And will you tell us again exactly who was present?

A. Well, it was Jack Bennett, myself, and Caro-

(Testimony of C. M. Wright.)

lyn Wright and Betty Bennett and Norma, whatever her last name is.

Q. And what was that conversation?

A. Well, it was about their activities at the place. They were working at the Highway Auto Courts where they were prostituting at.

Q. And will you tell us whether or not the discussion included anything relative to the charge before this court, the transportation to Alaska for the purpose of prostitution?

A. Yes, sir. Jack Bennett was talking to Carolyn Wright and he told her that he had a place in Las Vegas, Nevada, at the Sand Hotel.

Mr. Taylor: Just a moment, your Honor. I am going to object, not responsive to the question.

The Court: Objection overruled. [323]

Mr. Taylor: Now, just a moment. Could I interrupt, if the court please. The question was as to any conversation relative to a trip to Alaska. He is going off into Nevada now on that.

The Court: Well, I will sustain the objection.

Q. (By Mr. Stevens): Tell us the part that was relevant to the trip to Alaska, leaving Nevada out then, will you, please?

A. Well, it is hard to do.

Q. Did your conversation relate in any way to the trip to Alaska? A. Yes, sir.

Q. Did Mr. Bennett discuss before you the trip to Alaska that they subsequently took?

A. Yes, sir.

Q. And do you know of your own knowledge

(Testimony of C. M. Wright.)

that they did leave for Alaska? A. Yes, sir.

Q. And what was the part of the discussion that you had that night on the 18th of June, you said it was? A. Yes, sir.

Q. That pertained to the trip to Alaska, leaving out any reference to Nevada?

A. Well, he told Carolyn that he would leave her at this place on their way to Alaska, about how much money that could be made there. [324]

Q. Do you know whether or not the defendant you know as Steve Williams and Mr. Bennett made a trip to Galveston, Texas?

A. No, sir, I know we had the information that a trip was made.

Q. You have no knowledge of that yourself?

A. Through the bureau, and I have no first-hand knowledge of it.

Q. What type of work were you doing other than your relation to the Federal Bureau at the time we have just been discussing, Mr. Wright?

A. I was doing no work.

Q. Had you had a business prior to that time?

A. Yes, sir.

Q. What was your business?

A. I owned a finance company and a motor company.

Q. And how did you secure the acquaintance of Mr. Bennett?

A. Well, I had known of Mr. Bennett for quite some time in Odessa. I had known of and seen Jack Bennett on several occasions before that time, not

(Testimony of C. M. Wright.)

to personally meet him at all. I had known of him, but I had no personal acquaintance with him.

Q. And did you become a personal acquaintance of Mr. Bennett? A. Yes, sir, I did. [325]

Q. How often during this period that we have been describing did you see him?

A. Well, it was very often, every two or three days at least.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Tailor: May we have the recess, your Honor.

The Court: Yes, we will take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 4:00 p.m., the court took a recess until 4:10 p.m., at which time it reconvened, and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

C. M. WRIGHT

the witness on the stand at the time the recess was taken, resumed the stand for

Cross-Examination

By Mr. Taylor:

Q. What was your first name, Mr. Wright?

A. C. M. Wright.

(Testimony of C. M. Wright.)

Q. Rice? A. Wright, W-r-i-g-h-t.

Q. Where were you born, Mr. Wright. [326]

A. Leedey, Oklahoma.

Q. Lady? A. Leedey.

Q. How long you been in Odessa, Texas?

A. Since 1948.

Q. Did you go there from Oklahoma?

A. No, sir.

Q. Where did you go from?

A. Lubbock, Texas.

Q. Now, what is this title that you say you have, Mr. Wright? Did you say you was a Special Agent of the——

A. I was a Special Agent for the Federal Bureau of Narcotics.

Q. When was that? A. That was in 1953.

Q. And where did you get your appointment?

A. From Federal Bureau of Narcotics, Agent Tom Bean in Lubbock, Texas. I was assigned to his jurisdiction.

Q. And then you say you also had a finance company? A. Not at that time, no, sir.

Q. Oh, you didn't have it. What did you do with your finance company? A. Liquidated it.

Q. Did you liquidate it or did the bank liquidate it? A. I liquidated it.

Q. When was the first time you ever met Mr. Bennett? [327]

A. The first time I ever met him personally was on April the 4th, 1953.

(Testimony of C. M. Wright.)

Q. 1953, and how long had you been around Odessa at that time?

A. I had been there since 1948.

Q. 1948, and you had never met Mr. Bennett?

A. No, I had seen him.

Q. So all these conversations that you had with Mr. Bennett was between April the 4th, 1953, and the second, and the 18th of June, 1953?

A. That's right, sir.

Q. Between April and June, 1953, and when did you first meet Mr. Kehert?

A. I met—are you referring to Steve Williams, as I knew him?

Q. Well, where did you first meet the gentleman that is sitting at the end of the table down there?

A. I met him I believe it was in May was the first time that I——

Q. About what time in May?

A. Oh, it was, it was between May the 10th and May the 15th.

Q. And was that the time you was—he was driving the laundry truck?

A. Yes, sir, that was one of the times that he was driving the laundry truck. [328]

Q. And what did you say the laundry was?

A. Odessa Steam Laundry.

Q. Odessa Steam Laundry? A. Yes, sir.

Q. And you are absolutely sure that it was Mr. Kehert here, also known as Steve Williams, that was driving that laundry truck? A. Yes, sir.

Q. You talked with him?

(Testimony of C. M. Wright.)

A. Yes, sir, I talked with him.

Q. Now, isn't it a fact, Mr. Wright, that the man that drove the laundry truck was a man named Maxie Hallmark that owned the laundry?

A. No, sir, it isn't. I don't know who owned the laundry.

Q. You don't know it hadn't—

A. What I testified to was that Steve Williams, as he was known to me, drove up to Jack Bennett's apartment at the Arrowhead Courts in this laundry truck.

Q. And that was, you say was the first time you met him? A. What day are you speaking of?

Q. I don't know. You said the date, the middle of May.

A. Yes, that was the first time I ever seen Steve Williams.

Q. Yeah, the middle of May? [329]

A. Steve Williams, yes.

Q. Driving a laundry truck when he came to Mr. Bennett's apartment? A. That's right.

Q. Now, Mr. Wright, if we would show you by conclusive evidence that Mr. Kehert, also known as Steve Williams, was in Anchorage, Alaska, all of May, 1953, would you say you were mistaken?

A. No, sir, I would not.

Q. That he was waiting table at a restaurant that was operated by Larry Stars?

A. No, sir, I would not.

Q. You wouldn't be mistaken? A. No, sir.

Mr. Stevens: Your Honor, I have no objection if

(Testimony of C. M. Wright.)

Mr. Taylor promises to connect up these hypothetical facts he has stated here under oath, but if they are not connected up at a later time I am going to ask the court to strike this testimony of Mr. Taylor's.

The Court: Very well: I will remember it.

Q. (By Mr. Taylor): So you are just as sure of all these things you have testified to as you are that Mr. Kehert was in Odessa, Texas, in the middle of May, 1953?

A. Yes, sir.

Q. All of them are just as true as that? [330]

A. We are talking about Mr. Steve Williams. The rest of what I said is true also.

Q. What?

A. What else I testified to is also true.

Q. So the other is just as true as your statement that Mr. Kehert, also known as Steve Williams, was in Odessa, Texas, during the month of May, 1953?

A. Yes, he was in Odessa in 1953, in the month of May.

Q. And he was driving a laundry truck?

A. Yes, sir.

Q. Now, in May, the 18th, 1953, you say you drove to Big Springs with Mr. Bennett?

A. That's right.

Q. Did you return the same day?

A. Yes, sir.

Q. And you had a conversation with Mr. Bennett about him being in Alaska; do you remember how long before that he had been in Alaska?

A. No, I don't remember accurately.

(Testimony of C. M. Wright.)

Q. Might have been five years?

A. He didn't state what date it was that he had been in Anchorage. However, we knew through the department that he had been there.

Q. That he had been in Anchorage?

A. Yes, sir.

Q. But you don't know when he had been in Anchorage though? [331]

A. I don't know the exact date, no, sir.

Q. Did you know that Mr. Bennett had been in Anchorage for approximately six years?

A. No, I did not.

Q. You didn't know that? A. I did not.

Q. Not through the department?

A. No, sir.

Q. Or through information?

A. I didn't know how long he had been in Alaska.

Q. Or with any conversations with Mr. Bennett?

A. No. What I testified to awhile ago was what Mr. Bennett, or part of what he said. I didn't get a chance to finish.

Q. You know Maxie Hallmark that has the laundry in—— A. No, sir, I don't.

Q. Now, Mr. Wright, do you know a firm named Rainbow Laundry and Cleaners in Texas, or Odessa, Texas? A. Yes, we have one in Odessa.

Q. Now, isn't it a fact it was a laundry truck from the Rainbow Laundry and Cleaners that drove up to Mr. Bennett's apartment?

(Testimony of C. M. Wright.)

A. No, sir, it was the Odessa Steam Laundry truck.

Q. Odessa Steam Laundry. There is an Odessa Steam Laundry?

A. Yes, sir, and also a Rainbow. [332]

Q. Also a Rainbow?

A. Rainbow Cleaners. It is not a laundry.

Q. And that is run by a man named Hallmark, is it not?

A. Which one?

Q. The Rainbow.

A. I don't know who runs it.

Q. A man you know about as Steve Williams?

A. I told you I don't know. I don't know the man.

Q. Isn't it a fact that you have never seen Mr. Kehert before in your life, Mr. Wright?

A. No, sir, it is not.

Q. That you have got him mistaken for somebody else?

A. No, sir, I have not.

Q. Who have you talked this case over with before you came up here?

A. Before I came to Fairbanks?

Q. Yeah.

A. I talked it over last year when I gave the FBI in Odessa the information, after they was apprehended up here.

Q. And was that, was you kind of looking for a trip to Alaska out of that information, Mr. Wright?

A. I certainly was not.

Q. Close out your business; sure you didn't want to tour Alaska?

A. I'm sure I didn't.

(Testimony of C. M. Wright.)

Q. Government expense?

A. I'm sure I didn't. [333]

Q. Now, you say on May the 2nd you went to Lubbock?

A. No, I didn't say I went to Lubbock.

Q. Where did you go?

A. I went to Lubbock on——

Q. May the 2nd?

A. No, I didn't say that.

Q. May the 20th? A. May the 20th.

Q. How long was you gone on that trip?

A. All afternoon.

Q. And on the 18th of June, 1953, you was back in Mr. Bennett's apartment, Arrowhead Apartments?

A. That's right.

Q. Drinking his whiskey, were you?

A. Sure did.

Q. You made a habit to be at Mr. Bennett's quite awhile drinking his liquor?

A. Only when I was trying to purchase narcotics.

Q. And whiskey?

A. No whiskey. I wasn't trying to purchase whiskey.

Q. Mr. Wright, aren't you what is commonly known as a stool pigeon?

A. That is not correct.

Q. That you graduated from a loan shark to a stool pigeon? A. That is not right. [334]

Mr. Stevens: Your Honor, I believe the Code of Alaska protects a witness against intimidation and such remarks as Mr. Taylor is making here today.

(Testimony of C. M. Wright.)

The Court: Make your objections promptly.

Q. (By Mr. Taylor): How old are you?

A. Twenty-nine years old.

Q. I believe you stated the 18th of June was the last time that you saw Mr. Bennett?

A. That's right.

Q. And who was he with at that time?

A. He was with Carolyn Wright and Norma, whatever her name is, and Betty Bennett, his wife.

Q. Do you know Marilyn Casey?

A. Not by that name I don't.

Q. You don't know anybody by that name?

A. Not by Marilyn Casey, no.

Q. Did you see Wesley Kehert, also known as Steve Williams, on the 18th day of June, 1953?

A. Yes, sir.

Q. Where? A. In Odessa, Texas.

Q. Whereabouts in Odessa?

A. At Jack Bennett's apartment.

Q. Who was he with?

A. He drove up by himself. [335]

Q. On the 18th day of June, 1953?

A. No, May. You asked me on the 18th day of May.

Q. Now, wait a minute. You said that the last time you saw Jack Bennett was on the 18th day of June, 1953? A. That's right.

Q. Did you see Mr. Kehert at that time?

A. I did not.

Q. When was the last time that you had seen Mr. Kehert?

(Testimony of C. M. Wright.)

A. I believe it was on the 18th day of May.

Q. Well, wasn't the 18th day of May the day that you drove to Big Springs?

A. That's right.

Q. Did you see Mr. Kehert at that time?

A. Oh, I saw him when I got back to Odessa from Big Springs.

Q. Now, when they left Odessa, how—which direction did they take out of—

A. I don't know. The Rangers was after them. They probably left in any direction.

Q. And how far was it to the border?

A. Oh, two or three hundred miles to the border of Mexico.

Q. And how far to the border toward New Mexico? A. Toward New Mexico?

A. Yeah, toward New Mexico. You know, there is a state down there, New Mexico; how far is it to it? [336] A. From where?

Q. Where was they leaving from? Odessa?

A. Odessa, that's right.

Q. How far? A. To where?

Q. To New Mexico border?

A. I think about seventy-five or eighty miles, somewhere along there, to the New Mexico border.

Q. And you mean to say that the famous Texas Rangers couldn't catch these cars in that length of time?

Mr. Stevens: Just a moment. I am going to object to that, to Mr. Taylor using these phrases, your

(Testimony of C. M. Wright.)

Honor. If he wants to conduct a proper examination the government has no objection, but he is making these insinuations in his remarks and also testifying. Again I object to his testifying in his cross-examination. They are not hypothetical. They are not based on any facts before this court.

Mr. Taylor: If I have testified I certainly have not intended to, your Honor.

The Court: Proceed.

Q. (By Mr. Taylor): So you don't know what direction they took out of Odessa then?

A. No, I wasn't there at the time.

Q. You wasn't there when they left?

A. That's right. [337]

Q. So you don't know whether they left for Alaska or not?

A. No, they left for Houston, the information that we gathered.

Q. Do you know whether they got to Houston or not? A. No, I don't know.

Q. You didn't gather that information then?

A. No, I didn't. I know that they left for Houston and we lost track of them until they was picked up here.

Q. The Texas Rangers was unable to get them; is that right?

A. They arrested the girls that night.

Q. Up here? A. No, in Odessa, Texas.

Q. Let them loose?

A. After they fined them.

Q. Did they arrest them at Odessa?

(Testimony of C. M. Wright.)

A. Yes, sir.

Q. So you didn't know then when they did proceed for Alaska then, Mr. Wright?

A. No, sir, I didn't.

Q. Are you still stooling for the Narcotics Bureau?

Mr. Stevens: I object to that, your Honor.

Mr. Taylor: I will withdraw it.

Q. (By Mr. Taylor): Are you still undercover man for the Narcotics Bureau? [338]

A. No, sir, I'm not.

Q. You lost that job?

A. I did not lose it. I resigned.

Q. What are you doing at the present time?

A. I am with Texas Bankers in cooperative.

Q. Detective?

A. No, sir. I run the loan department.

Q. Now, I'm just going—want to get this, be sure of this. Your testimony is that you saw Wesley Kehert in Odessa on the 18th day of May, 1953?

A. I saw Steve Williams, that was what he was known to me.

Q. You didn't see Wesley Kehert then?

A. Yes, sir, if that is his real name, I did.

Q. That man sitting at the end of the counter?

A. That's right. I sure did.

Q. And the rest of your statements are just as true as that one is; is that right?

A. Yes, sir, I said that awhile ago.

Mr. Taylor: That's all.

(Testimony of C. M. Wright.)

Redirect Examination

By Mr. Stevens:

Q. Mr. Wright, in regard to the conversation you described formerly about the trip to Anchorage, Alaska, the discussion you had with Mr. Bennett, did he tell you what purpose he would have in bringing the girls to Anchorage, Alaska?

A. Yes, sir. [339]

Q. What was that?

A. Well, he told me how much money he could make from his girls prostituting in Anchorage.

Q. And for whom did you work after you left the Bureau of Narcotics, Mr. Wright?

A. Odessa Police Department.

Q. And how long have you been with the Bankers Corporation?

A. I resigned, I started to work with Bankers the first day of January.

Q. Of this year?

A. Yes, sir.

Mr. Stevens: That's all for right now. Your witness, Mr. Taylor.

Recross-Examination

By Mr. Taylor:

Q. Mr. Wright, I suppose if you had bought any narcotics from Mr. Bennett you would have arrested him, would you?

A. Not at that time, no, sir.

Q. So you never had him arrested though, did

(Testimony of C. M. Wright.)

you? A. No, sir, I did not.

Mr. Taylor: That's all.

The Court: Is that all, Mr. District Attorney?

Mr. Stevens: Just one minute, please. [340]

Redirect Examination

By Mr. Stevens:

Q. Mr. Wright, do you have any knowledge of what occurred at Mr. Bennett's apartment on the 19th day of June, 1953, in the evening?

A. I would have to think a minute, I believe, on the 19th of May?

Q. This is June? A. Of June?

Q. Yes, the 19th of June, 1953. Mr. Wright, were you working in connection with the Sheriff's Department there at all in Odessa, Texas?

A. No, sir, I was not. I was just trying to stay out of their way.

Q. You said that in answer to a question of Mr. Taylor that the girls had been arrested on that night? A. Yes, sir.

Q. Do you remember what that arrest was for?

Mr. Taylor: Now, just a moment, your Honor. I am going to object to the question upon the grounds that this would be merely hearsay as to something he had heard. I believe the records of an arrest would be the best evidence, your Honor.

Mr. Stevens: Very well, your Honor. We will withdraw the question. Your witness, Mr. [341] Taylor.

(Testimony of C. M. Wright.)

Recross-Examination

By Mr. Taylor:

Q. Mr. Wright, I understand from your answer to a question by Mr. Stevens that you were dodging the Sheriff on the 18th day of June, 1953?

A. That's right. Jack Bennett was paying them off to let his girls operate.

Q. And you was dodging the Sheriff?

A. Yes, sir.

Q. To keep from being arrested?

A. No, sir, I was not. I didn't want the Sheriff to see me with Jack Bennett because I was afraid they might tell him who I was.

Q. Well, isn't it a fact that Mr. Bennett knew all the time that you were an undercover man or a stool pigeon for the Narcotics Bureau?

A. I found out later that a Deputy Sheriff called and told him.

Q. So he knew all the time that you——

A. Not at that time, no.

Q. So then knowing what you were, you still state that he made these admissions to you up until the day he left Odessa then?

A. Yes, sir, that was the day that he was called and was told who I was.

Q. Well, isn't it a fact that you was told two months [342] before that you were a stool pigeon for the Narcotics Bureau?

A. No, sir, I was not no stool pigeon for the Narcotics Bureau.

(Testimony of C. M. Wright.)

Q. April the 5th?

A. No, sir. Jack Bennett accused me of being an agent, and——

Q. On April 5th?

A. I don't know the date. I know he accused me of it several times.

Q. And still at that, knowing you to be an agent and accusing you of being an agent you say that he still told you about his activities?

A. He didn't know that I was an agent.

Q. He told you you were an agent?

A. Yeah, he told me I was, but he wouldn't have took me into the people that he did if he had known I was.

Q. The Deputy Sheriff had told him that you were? A. He didn't at that time, no, sir.

Q. Have you ever been convicted of a crime, Mr. Wright? A. No, sir, I have not.

Q. Ever been in jail?

A. No, sir, I have not.

Q. You successfully dodged the Sheriff then; is that right? A. I sure did for awhile.

Mr. Taylor: That's all. [343]

Redirect Examination

By Mr. Stevens:

Q. Mr. Wright, when was it that the Deputy Sheriff notified Mr. Bennett who you were?

A. It was in June, the day that he left Odessa.

Mr. Taylor: Just a moment. I believe the proper foundation hasn't been laid for that, your Honor.

(Testimony of C. M. Wright.)

The Court: Objection overruled.

Q. (By Mr. Stevens): Proceed, Mr. Wright.

A. It was the night of June the 18th, I believe, when he was notified that I was an Agent and that also that the Rangers was fixing to raid his place.

Q. And when was it that Mr. Bennett had accused you of being an agent for the Bureau of Narcotics?

A. Oh, it wasn't an accusation in one sense of the word, and one sense it was. I mean, he told me several times, he said, "I think you are an agent." He said, "I don't know for sure, but" he said, "I know that there is some agents working down here." He said there is seven or eight of them. Of course, there wasn't. There was only two of us.

Q. And just what brought about these trips that you took with Mr. Bennett?

A. To purchase narcotics.

Q. And were they successful?

A. No, sir. [344]

Q. And what terminated your acquaintance with Mr. Bennett?

A. At the time that he left Odessa.

The Clerk: Government's Identification No. 49.

(A photograph of four people was marked "Government's Identification 49.")

Q. (By Mr. Stevens): This is Government's Identification 49, Mr. Wright; will you tell us what that is, please?

A. It is a picture.

(Testimony of C. M. Wright.)

Mr. Taylor: Just briefly state, not describe.

Mr. Stevens: Let Mr. Taylor address his objections to the court. My question is, will you tell us what this is, please.

A. Yes, sir. It is a picture of myself, Carolyn Wright, Agent Herman Pizinni and Jack Bennett.

Q. And where was that picture taken?

A. In the Mink Club at Amarillo, Texas.

Q. Is this one of those pictures that a photographer comes around in a night club, takes a picture and gives you a copy of it? A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor. [345]

Recross-Examination

By Mr. Taylor:

Q. At the time you and the other agent and Mr. Bennett was in the Mink Club, were you drinking?

A. Yes, we was.

Mr. Taylor: That's all.

Mr. Stevens: We offer Government's Identification No. 49 in evidence, your Honor.

Mr. Taylor: We object, your Honor, upon the grounds it is irrelevant, immaterial, incompetent and doesn't go to prove any of the issues of the Indictment, your Honor, in any way whatsoever.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "Q."

(Government's Identification No. 49 was re-

(Testimony of C. M. Wright.)

ceived in evidence as Government's Exhibit
"Q.")

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: I am through with him.

(Witness excused.)

Mr. Stevens: Call Miss Rogers.

BARBARA ROGERS

a witness called on behalf of the plaintiff, was duly sworn, and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Barbara Rogers. [346]

Q. Where do you live?

A. Seward, Alaska.

Q. And would you tell the court, please, what your occupation was in July of 1953?

A. What it was?

Q. That's right.

A. I was running a rooming house in Seward, Alaska.

Q. And was this house on the line in Seward?

A. Yes, it was.

Q. The line was open at that time?

A. Yes.

Q. And did you have any girls working in your house?

A. I had two.

Q. They were?

(Testimony of Barbara Rogers.)

A. Christy Parker and Judith Lebuff.

Q. And you were running the house as a bawdy house openly in Seward?

A. We all were, yes.

Q. At that time the line was open, was it not?

A. Yes, the City allowed us to be there.

Q. Could you tell us whether or not at approximately that time you saw the defendant James Bennett in Seward, Alaska?

A. I didn't know them by name.

Q. Well, did you see the gentleman who is sitting at the table on your right, Mr. Bennett? [347]

A. I'm not sure I seen them. I told Mr. Clark of the FBI when he showed me pictures that both men looked alike to me, and I couldn't tell them apart.

Q. But did you tell the FBI that you had seen them in Seward?

Mr. Taylor: Just a moment, your Honor. We are going to object to any conversation with the FBI not made in the presence of these defendants.

The Court: What is your procedure then?

Mr. Taylor: Move to strike it.

The Court: It may be stricken.

Q. (By Mr. Stevens): Miss Rogers, did you see either of these gentlemen or both of them in Seward?

A. Well, I didn't know who these gentlemen were until a girl that had worked for me told me the names of the men. I did not know them myself.

Q. But without knowing their names, did you see them in Seward? A. I seen two men.

(Testimony of Barbara Rogers.)

Q. And are these the two men?

A. I can't say that they are or aren't.

Q. Well, now, as a matter of refreshing your recollection, you were shown pictures of the gentlemen by the FBI in Seward?

A. That's right. [348]

Q. And at that time your memory was a little fresher than it is now?

A. My memory was no fresher than it is now. I told the FBI that both of them looked like one man in the pictures and I told them that at the grand jury in Anchorage, when I was called there on the same case.

Q. Well, did you see a gentleman which looked like either of these gentlemen in Seward?

A. My goodness, I see several hundred men a day when we are open.

Q. Was it not a fact that you subsequently identified the man that you saw as one of the gentlemen here in court?

A. I did not identify them. They were brought to me for identification.

Q. Did you not later ascertain that they were?

A. Only through the girl's say-so that had been working for me.

Q. Miss Rogers, did you talk to Mr. Taylor this noon?

A. I met him on the street and know him for quite some time and just said hello on the corner.

Q. Did you discuss the facts of this case at all?

A. No, not at all.

(Testimony of Barbara Rogers.)

Q. Have you been sitting outside in the hall discussing the facts of this case with Marilyn Jean Casey? A. No, I don't know that girl.

Q. Wasn't it a fact you told me yesterday you were introduced to them in Anchorage? [349]

A. I was at a night club drinking when somebody said, meet Mr. Bennett and Mr. Kehert, and I said, "How do you do."

Q. And did you not at that time recognize them as the gentlemen you had seen in Seward?

A. No, I did not until I was told that they were the ones that were in Seward by the names.

Q. When was this that you had seen a gentleman that you described to the FBI in Seward?

A. Oh, in Seward. Well, at the time that there was supposed to have been two men come to the house and ask if I could use any girls.

Q. And when was that?

A. I don't remember the exact date. I imagine you have it there.

Mr. Taylor: Just a moment, I would like to get that answer to that last question.

(The reporter read the answer to the last question as follows: "I don't remember the exact date. I imagine you have it there.")

Mr. Taylor: I am going to object to any further questions along this line until the date is established as to when this took place.

The Court: Well, make your objections to the question.

(Testimony of Barbara Rogers.)

Q. (By Mr. Stevens): Do you know Fern [350] Bennett? A. No, I do not.

Q. Did you know Fern Bennett as a girl named Pat in Seward?

A. I didn't know any of the girls except the ones working for me.

Mr. Stevens: Your Witness, Mr. Taylor.

Mr. Taylor: No questions.

Mr. Stevens: That's all, Mrs. Rogers.

(Witness excused.)

Mr. Stevens: May we have the recess at this time, your Honor?

The Court: Did you want to put on some more? I will take the usual adjournment for the evening unless you have something more.

Mr. Stevens: That is what I mean, the usual adjournment, and, your Honor, if it is permissible with you, could we notify the jury not to come in tomorrow, but to come in Friday morning, the regular panel, the rest of the panel. They were told on Monday to return Thursday.

The Court: Mr. Clerk, would you notify them?

The Clerk: Mr. Taylor says he doubts very much, your Honor, if we will finish it tomorrow.

Mr. Taylor: There is a possibility, your Honor, but——

The Court: If that is the case we had better notify those jurors not to appear until [351] Monday.

The Clerk: Monday. Very well, your Honor.

Mr. Taylor: Your Honor, I would hate to take my opinion on this thing, and if we did get finished tomorrow I don't like to take the blame for it. I am not absolutely sure.

The Court: We will have to take your guess on it, I guess.

Mr. Stevens: It is agreeable with us. We have three more witnesses, your Honor. The government has three witnesses.

The Court: Well, we will notify them to come in Monday at ten o'clock then.

In a moment we will take an adjournment until tomorrow morning at ten o'clock, ladies and gentlemen of the jury. In the meantime, remember to be very careful about hearing anything about this case from people who are not on the stand testifying under oath. Remember not to listen to anyone talk about the case or about the parties in it. Keep your minds free from an opinion as to the guilt or innocence of these defendants and adhere to that, those instructions until this case is finally submitted to you.

Adjourn until tomorrow at ten.

The Clerk: Court is adjourned until tomorrow morning at ten o'clock.

(Thereupon, at 5 o'clock p.m., the trial of this cause was adjourned until May 13, 1954, at 10 a.m.) [352]

Be It Remembered, that upon the 13th day of May 1954, at the hour of 10 o'clock a.m., the trial

of this cause was resumed, the plaintiff and the defendants both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Call the roll of the jury.

(Whereupon the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case, United States v. Bennett, et al.?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor. Call Mr. McCown.

N. D. McCOWN

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. My name is N. D. McCown.

The Clerk: Government's Identification No. 50.

(A photograph of Marilyn Jean Casey was marked Government's Identification No. 50.)

Q. (By Mr. Stevens): Where do you reside, Mr. McCown?

A. My home is 717 A in Galveston, Texas. [353]

Q. And what is your business in Galveston, Texas? A. Police Detective.

Q. And were you a police detective in June of 1953, in Galveston, Texas? A. I was, sir.

(Testimony of N. D. McCown.)

Q. Mr. McCown, I hand you Government's Identification 50; would you tell us, if you know this individual whom we know as Marilyn Jean Casey?

A. Yes, sir, I know the lady, but not by that name.

Q. By what name did you know her?

A. I knew her by the name of Sheridan. She was working under the name of June.

Q. And was that in Galveston, Texas?

A. Yes, sir, it was.

Q. Where is the line in Galveston, Texas?

A. You refer to the line as the red light district, is that what you are referring to, sir?

Q. That's correct, the houses of prostitution.

A. Up until about August it was from 25th to 28th on Post Office Street.

Q. That is in Galveston, Texas?

A. Yes, sir.

Q. Did you know a Candy who was a prostitute in Galveston? A. Yes, sir.

Q. And was that in a—did you know her in approximately June of 1953? [354]

A. She was there, yes, sir, at that time.

Q. And did you know a Rita who was a prostitute in Galveston approximately the same time?

A. Yes, sir, I do.

Q. And where did Rita reside in June of 1953?

Mr. Taylor: Just a moment, Mr. McCown. I am going to object to the line of questioning as incompetent, irrelevant, and immaterial, concerns people

(Testimony of N. D. McCown.)

that we know nothing about here; don't see what they go to prove, your Honor.

Mr. Stevens: Your Honor, Mr. Taylor has gone to some length to impeach to a certain extent the government's witness and the statements she made at a prior time. This witness is testifying as to incidents and people covered in that statement and has identified them as people who are in Galveston so far.

The Court: Well, the last person you mentioned was not a defendant, was she?

Mr. Stevens: No, I merely asked Mr. McCown if he knew a Rita in Galveston, Texas.

The Court: She is not a defendant in this case?

Mr. Stevens: No, she is not a defendant in this case and there is no conversation of Rita. It is just did he know personally a Rita as a prostitute in Galveston.

The Court: Well, I will sustain the objection.

Mr. Stevens: May we make an offer of proof, your Honor? [355]

The Court: Yes.

(Thereupon, the attorneys approached the bench, and the following proceedings were had out of the hearing of the jury.)

Mr. Stevens: Your Honor, Government's Exhibit "O," Miss Casey's statement, says that she knew a Candy Gordon at Club 16 where she was a barmaid in Galveston, Texas. It also says that she met a Rita in Galveston, Texas, and that through

(Testimony of N. D. McCown.)

Rita and Candy she met the defendants, Wesley Kehert, also know as Williams, and Jack Bennett. She also said that she knew a Jim Senseney in Galveston, and Mr. Taylor has elicited from Miss Casey the fact that these are all lies and we wish to rehabilitate our witness to a certain extent by showing that they were true. You asked Miss Casey and she said it was not true.

Mr. Taylor: Not that particular part.

Mr. Stevens: The statement in itself.

The Court: The offer is denied.

(The attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

Q. (By Mr. Stevens): Well, did you know Miss Casey in Galveston, Texas?

A. This girl you refer to?

Q. Yes. A. Yes, I did.

Q. And did you see her in June of 1953? [356]

A. I did, sir.

Q. And where did you see her at that time?

A. At 2710 Post Office Street.

Q. And what was the purpose of your visit, Mr. McCown?

A. We had a call, if I may look at my memorandum here for exact time. We had a call from a radio——

Mr. Taylor: I think we are going to object to this, your Honor, the line of questioning as to what happened in Galveston prior to coming to Alaska,

(Testimony of N. D. McCown.)

or prior to any of the happenings of the allegations contained in the Indictment as it would have no bearing upon this case, nor would it be competent, relevant or material. This man producing some document from Galveston, Texas, we have no opportunity of refuting it, your Honor.

The Court: You are familiar with what this man's testimony is going to be now, are you?

Mr. Stevens: Yes, your Honor. I would be glad to again make an offer of proof as to what his testimony will be.

The Court: If you will.

Mr. Stevens: Yes, sir.

(Whereupon, the attorneys approached the bench, and the following proceedings were had out of the hearing of the jury.)

Mr. Stevens: His testimony will be, your Honor, that on the 14th day of June, which is just shortly before [357] this trip started, if your Honor remembers it started from Odessa, Texas, on the 20th of June. This is on the 14th day of June, he saw Miss Casey and he saw her and had a conversation with her in a house of prostitution as a result of a phone call from her parents and he personally—he has a record of the fact that he received a phone call and was asked to locate this girl and he did locate her and she was in Galveston on the 14th day of June, 1953, and at that time she admitted that she was a prostitute.

(Testimony of N. D. McCown.)

The Court: That was the line, was it. He found her on the line?

Mr. Stevens: Yes, sir, and we make this offer, under the same law that we cited to the court yesterday, that the activities of the party and the people involved in this case for a reasonable time before and after this. We show the same thing, your Honor, as far as Miss Casey's activities here in Fairbanks.

Mr. Taylor: I think that was a little remote. That was prior to any meeting between these defendants and Miss Casey. It looks to me like it is going a little far afield.

The Court: I think that you are entitled to show that and also to show if he has any memoranda, whether made by himself or anybody else, which he used at the time to locate her. Well, I think you probably better eliminate that data any way, unless it was made by him at the time.

Mr. Stevens: Yes. [358]

The Court: It is not important otherwise.

(The attorneys withdrew from the bench, and the following proceedings were had in the hearing of the jury.)

Q. (By Mr. Stevens): Mr. McCown, this memorandum that you requested permission to refer to, is that a memorandum that you made at the time of your conversation with Miss Casey?

A. Yes.

Q. And was that made as the normal course of your duties? A. Yes, sir.

(Testimony of N. D. McCown.)

Q. And you made the records yourself?

A. Yes, sir, I did.

The Clerk: Government's Identification No. 51.

(Memorandum made by the witness, McCown, was marked Government's Identification No. 51.)

Q. (By Mr. Stevens): I hand you Government's Identification 51, Mr. McCown; is this the original of the memorandum to which you referred previously?

A. Yes, sir, it is.

Q. And now, Mr. McCown, will you tell us, did you see Miss Casey on June the 14th, 1953?

Mr. Taylor: Just a moment, your Honor. We are going to object. That memorandum to which he refreshed his [359] memory has no mention, your Honor, of Marilyn Jean Casey. Entirely different person, and he says he don't know Marilyn Jean Casey, your Honor, so we are going to object until——

The Court: He testified he knew her by another name.

Mr. Taylor: He said he never heard the name, your Honor.

The Court: I can't hear you.

Mr. Taylor: He testified he never heard the name of Marilyn Jean Casey down there.

The Court: Objection overruled.

Q. (By Mr. Stevens): What was the purpose of your visit on June 14, 1953?

A. We received a call by radio police radio at

(Testimony of N. D. McCown.)

8:05 p.m., June 14, 1953, received a call by radio to see a complainant.

Mr. Taylor: Just a moment, Mr. McCown. We are going to object to any conversations, your Honor. It would only be hearsay.

Mr. Stevens: Yes, Mr. McCown, if you will just tell us what was your purpose of going to see her.

A. We went to see a complaint at 412 Eleventh Street in Galveston. When we got there the parents of this girl were there from Oklahoma and they asked us if we would try to contact the girl, that she was supposed to be working there [360] and they wanted to get in contact with her. She didn't tell us why. She gave us the name of Marie Sheridan. We checked one place, the Club 16 on Sixteenth and Avenue B, in Galveston, and she had previously worked there, but she had gone. We received information there that she had moved and gone to work at 2710 Post Office Street. We then went to 2710 Post Office Street and this girl was there. We talked to her at the place and asked her if she would get some clothes on and come with us, that her mother wanted to talk to her. She did so, and we took her back to 412 Eleventh Street. Her mother had already found out in the meantime from another girl, a prostitute there named Storey—

Mr. Taylor: Just a moment. We are going to object to what the mother said as something she heard.

The Court: Objection sustained .

Q. (By Mr. Stevens): Go ahead.

(Testimony of N. D. McCown.)

A. When we took her back her mother started crying and begging her to go back home with her. Her mother had married——

Mr. Taylor: Your Honor, the marriage certificate would be the best evidence.

Q. (By Mr. Stevens): Yes, I'm afraid you will have to skip that part.

A. Well, let's say that the girl said that, in my presence that the mother had married this man that was with her. [361]

Mr. Taylor: We are objecting to what the girl said, your Honor.

Mr. Stevens: Miss Casey is not a defendant here, Mr. McCown.

Q. (By Mr. Stevens): Did you see Marilyn Casey at this place, where was it you said, on Post Office Street? A. 2710 Post Office Street.

Q. And is that house known to you as a dectective of the Police Department of the City of Galveston as a house of prostitution? A. Yes, sir.

Q. And did you have any conversation with Miss Casey herself concerning prostitution?

A. Yes, of course.

Q. And when was that?

A. That same day, sir.

Q. And who was with you at that time?

A. My partner, Tony Cifu.

Q. How do you spell that?

A. C-i-f-u.

Q. And at that time, well, what time was it, please?

(Testimony of N. D. McCown.)

A. It was between 8:05 and 9 p.m., June 14th, 1953.

Q. And what was the conversation about prostitution, please?

A. She told us there that her mother was (Interrupted)—— [362]

Mr. Taylor: Just a moment, your Honor. We are going to object as to hearsay testimony.

The Court: Objection overruled.

A. For one thing, she propositioned me, asked me if I wanted it, for one thing.

Q. At that time, was the line running open in Galveston? A. Yes, it was.

Q. And did you, as a detective of the police down there, know prostitutes in that area?

A. Yes, sir.

Q. And they were all working openly, were they?

A. Yes, sir.

Q. Did you know any of the other girls who were working in the same house? A. Yes, sir.

Q. Who were some of them, for instance?

Mr. Taylor: We object, your Honor. Incompetent, irrelevant and immaterial.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. McCown? A. McCown.

Q. May I take a look at that?

A. You want the picture? [363]

(Testimony of N. D. McCown.)

Q. I want your memorandum, too.

A. I see.

Q. Mr. McCown, when was the word "Marilyn Jean Casey" put on the back of this picture?

A. I don't know, sir.

Q. What? A. I don't know, sir.

Q. Did you bring that picture with you from Galveston? A. No, sir, I did not.

Q. Where did you get it?

A. The prosecutor just handed it to me.

Q. And you recognized her as the girl that you had seen in Galveston, Texas? A. I do, sir.

Q. And now you testified from a memorandum here as to some girl named Marie Sheridan, is that not right?

A. That is the name she used there, sir.

Q. And did you ever know of her using the name of Marilyn Jean Casey in Galveston?

A. I did not.

Q. So somebody told you that she used that name, is that right?

A. I don't know. Nobody told me she used that name.

Q. Well, how is it you glibly refer to her as Marilyn Jean Casey? How do you know that she is Marilyn Jean Casey? Did you read this name on the back of this? [364]

A. I don't know, sir. These women change their names every week or so.

Q. Well, what was her name last week?

(Testimony of N. D. McCown.)

A. While she was in Galveston her name was Marie Sheridan.

Q. Yeah, what week was that?

A. June the 14th.

Q. Well, what was it on June 21st?

A. I really don't know.

Q. What was it June the 7th?

A. I really don't know, sir.

Q. So they don't change their name every week then, do they?

A. It has been known to happen.

Q. Now, I take it then, Mr. McCown, that prostitution is a legitimate business in Galveston, Texas; is that right?

A. No, sir, it isn't.

Q. It is not?

A. No, sir.

Q. Police officers go into these houses that you say are prostitution?

A. They are closed.

Q. Did you close them?

A. We closed them.

Q. How long they been open?

A. Longer than I have been alive, I imagine, sir. [365]

Q. Quite a historic institution, weren't they?

A. I understand they were. I only lived in Galveston some ten years.

Q. So then you don't know whether this is Marilyn Casey or not, do you, this Marie Sheridan?

A. I don't know what her name is. She used Sheridan in Galveston.

(Testimony of N. D. McCown.)

Q. Were you subpoenaed to come up here and tell this jury that story?

A. I was subpoenaed to come up here and tell this jury what I know about this girl.

Q. About Marie Sheridan? A. Yes, sir.

Q. When did you close the line in Galveston?

A. I believe it was in August, sir.

Q. Of what year? A. '53.

Mr. Taylor: That's all.

Redirect Examination

By Mr. Stevens:

Q. Mr. McCown, would you tell the court and the jury whether or not Marilyn Jean Casey and this Marie Sheridan are one and the same person?

Mr. Taylor: Just a moment, your Honor. I am going to object to the question because it calls for a conclusion of this witness. He said he don't know anybody by the name of [366] Marilyn Casey, or has never known anybody by the name of Marilyn Jean Casey.

Mr. Stevens: Your Honor, I have shown to the witness and I stated her name what is known to us as Marilyn Jean Casey. Now, I am asking this witness if the person shown in this picture as Marilyn Jean Casey is one and the same person known to Mr. McCown as Marie Sheridan.

The Court: All right. Answer that question.

Mr. McCown: They are, sir.

(Testimony of N. D. McCown.)

Q. (By Mr. Stevens): And at that time, Mr. McCown, what was the color of her hair?

A. She was a blonde at that time.

Mr. Stevens: We offer Government's Identification 50 in evidence, your Honor.

Mr. Taylor: We are going to object to it upon the grounds it is a self-serving declaration of the prosecution. No testimony that this is Marilyn Jean Casey, your Honor; no showing where the picture was taken, and for the further reason that the photograph is highly prejudicial. It don't show any conviction of a crime whereas the testimony, your Honor, shows that she was arrested and after signing an affidavit for the FBI was released, and there was no prosecution on it, your Honor. Such a picture as that would be highly prejudicial especially in view of the position it is [367] taken, and I understand that it is the rule of the jail when those pictures are taken and there is no conviction they are supposed to be destroyed and returned. We feel it is highly improper, your Honor, at this time, and we are objecting strenuously to the introduction of that statement.

Mr. Stevens: Mr. Taylor's statement shows that it is obvious he knows where it was taken, your Honor. I will be glad to bring the jailer up. We offer Government's Identification 51 in evidence.

Mr. Taylor: We are going to object to that, too, your Honor. We feel it is self-serving, no reference to any of the defendants. Self-serving, made by this

(Testimony of N. D. McCown.)

man, no date on it, no statement as to when it was made or under what conditions.

The Court: Objections sustained.

Mr. Stevens: Very well, your Honor. Your witness, Mr. Taylor.

Mr. Taylor: No further questions.

The Court: Are you through with this witness?

Mr. Stevens: Yes, your Honor, at this time.

(Witness excused.)

Mr. Stevens: May we have just one moment, your Honor, please?

Your Honor, may we ask for a short delay or recess until we find out who took this picture of Miss Casey downstairs. [368]

The Court: How long do you want?

Mr. Stevens: It will take just about five minutes, your Honor, and then, your Honor, I might notify the court that the last government witness did not arrive and will not be in until 11:30 this morning, and for that reason we would like to ask the court for a continuance until two o'clock as soon as we put on this next witness.

The Court: Will five minutes be enough?

The Clerk: Court is recessed for five minutes.

(Thereupon, at 10:30 a.m., the court took a recess until 10:40 a.m., at which time it reconvened, and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well.

Mr. Stevens: Call Mr. Prosser, please.

HAROLD L. PROSSER

a witness called on behalf of the plaintiff, was duly sworn, and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Harold L. Prosser.

Q. And where do you reside, Mr. Prosser? [369]

A. Fairbanks.

Q. And what are your official duties?

A. Jail Supervisor for the Federal jail.

Q. Here in Fairbanks, Alaska?

A. Correct.

Q. This is Government's Identification 50, Mr. Prosser; will you tell us, did you take that picture?

A. No, I did not.

Q. Do you have a picture of Marilyn Jean Casey which is part of the official record of your jail?

A. I do.

Q. And can you testify that the picture you have was kept as part of your official duties as the supervisor of the Federal jail in Fairbanks?

A. Correct.

Q. Do you have that picture with you now?

A. I do.

(Testimony of Harold L. Prosser.)

Q. May I have it, please?

The Clerk: Government's Identification No. 52.

(A photograph of Marilyn Jean Casey was marked Government's Identification 52.)

Q. (By Mr. Stevens): I hand you Government's Identification 52; will identify that for us, please?

A. The pictures are identical. [370]

Q. And is that a, is Government's Identification 52 an official document of your records pertaining to Miss Casey while in your custody?

A. Correct.

Q. And is it your normal procedure to take pictures such as the picture you have in your hand, Government's Identification 52?

A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. Prosser, did you take that picture?

A. No, sir.

Q. Well, when was it taken?

A. I would have to check the records. I don't know for sure.

Q. You don't know when it was taken?

A. Pictures are usually taken the morning of the arraignment, following arraignment.

Q. Following arraignment. Now, what is your procedure in the event, if a person is arrested and

(Testimony of Harold L. Prosser.)

are later released and not prosecuted. What do you do with those pictures?

A. Nothing. They are in the dead file.

Q. Is that in the dead file now?

A. It is.

Q. There was no prosecution had under that arrest then, is that right? [371]

Mr. Stevens: I object to that, your Honor.

Q. (By Mr. Taylor): Do you know whether there was?

A. I am not aware whether there was or was not.

Q. When did you take over the duties as supervisor of the Federal jail?

A. July the first.

Q. Last year? A. '53.

Q. So you don't know when this picture was taken?

A. I could check her record and tell.

Q. Could you tell exactly when that picture was taken just by checking the records. Do you have any notation on your records that show the hour when the picture was taken?

A. Not the hour, no, sir. I have a record showing the hour that she was booked in the jail, and the hour of the arraignment and the picture follows the arraignment.

Q. That is your supposition, is it not?

A. No, they do follow the arraignment.

Q. Do you know whether this one followed the arraignment?

(Testimony of Harold L. Prosser.)

A. They follow the arraignment.

Q. Were you present at the time?

A. I cannot be present twenty-four hours a day.

Q. It would only be a conclusion, wouldn't it?

You wasn't even in the country at the time that picture was taken? [372]

A. I most certainly was.

Q. Was you in Fairbanks? A. I was.

Q. What time was that picture taken?

A. The day following the arraignment.

Q. You say you took over this job in August?

A. July the first, 1953.

Q. What day of July? A. The first.

Q. July the 1st, 1953, so you would have to check your records, would you get your record and see what day that picture was taken?

A. Was arraigned on 7th at ten o'clock on the 7th.

Q. Your record shows that?

A. It shows the arraignment on the 7th.

Q. When was Miss Casey released from your custody, Mr. Prosser?

Mr. Stevens: I object, your Honor. That is not within the scope of the direct examination.

Mr. Taylor: I believe I can go into the matter of detention, your Honor. It would seem to me——

Mr. Stevens: He can, but he is going beyond the scope of direct examination, if your Honor will permit it.

The Court: Objection will be sustained.

Q. (By Mr. Taylor): Mr. Prosser, you know

(Testimony of Harold L. Prosser.)

that Miss Casey was never [373] prosecuted under any charge that she was brought on at that time?

A. I am not aware of whether she was or was not.

Q. You said awhile ago that she wasn't?

A. I said the same thing I said a moment ago. I am not aware of whether she was or was not.

Mr. Taylor: That's all.

Mr. Stevens: Your Honor, we offer the picture which is Government's Identification 52 in evidence pursuant to Title 28, United States Code, Section 1733, a government record, part of the official records of the jail.

Mr. Taylor: It is in the dead file, your Honor. I don't think it is a government record at the present time. I am going to object on the further grounds that it is highly prejudicial and it is only introduced here for the purpose here of prejudicing Miss Casey before this jury, and that placard she is holding there, your Honor, if it was off I would have no objection to that picture.

Mr. Stevens: Miss Casey is not on trial in this court, your Honor.

The Court: Objection overruled.

The Clerk: Government's Exhibit "R."

(Government's Identification No. 52 was received in evidence as Government's Exhibit "R.")

(Witness excused.) [374]

Mr. Stevens: I would like to call Miss Casey for just one or two questions, please.

MARILYN JEAN CASEY

a witness recalled on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Miss Casey, this is Government's Exhibit "R"; is that your picture? A. It is.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Miss Casey, since you were on the stand day before yesterday, have you received any further threats from any officers of the law?

A. Yes, sir, I have.

Q. And where was, when was those threats made?

A. Well, Mr. Stevens walked in the courtroom to a friend of mine (interrupted)——

Mr. Stevens: Just a moment, your Honor. I am going to object to any hearsay testimony concerning threats of mine.

Miss Casey: Three people heard it.

Q. (By Mr. Taylor): Well, what did you hear, Miss Casey? [375]

A. Mr. Stevens came down the hall and told me he was going to do his best to get me ten years.

(Testimony of Marilyn Jean Casey.)

Mr. Stevens: I will, too, Miss Casey.

Miss Casey: Thank you.

Mr. Taylor: I would like the record to show that Mr. Stevens said in open court that he was going to get Miss Casey ten years.

Mr. Stevens: Any further questions, Mr. Taylor?

Mr. Taylor: That's all right now.

(Witness excused.)

Mr. Stevens: Call Bea Whispell.

BEULAH WHISPELL

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Will you speak up loud so the people can hear you, Miss Whispell? A. I will try.

Q. Would you state your name, please?

A. Beulah Whispell.

Q. Where do you reside?

A. 550 Sixth Avenue.

Q. And what is your occupation?

A. Hotel owner.

Q. And what hotel is that?

A. The Fifth Avenue Hotel. [376]

Q. And where is that located?

A. At 637 Fifth Avenue.

Q. In what city is that located?

A. Fairbanks.

(Testimony of Beulah Whispell.)

Q. How long have you operated that hotel?

A. Since the latter part of '48.

Q. You were operating that hotel during June and July of last year; is that correct?

A. Yes, I was.

Q. Now, in your operation of that hotel, Miss Whispell, do you keep records and registrations of persons that stay at your hotel?

A. Yes, I do.

Q. Are they kept under your care and custody?

A. Yes, they are.

Q. Are you required to keep such records?

A. Yes, by law.

Q. Have you made a check of your records before coming to this court, Miss Whispell?

A. Yes, I did.

Q. And during that course, that checking of the records have you found a registration pertaining to a J. Bennett?

A. Yes, I have.

Q. Do you have that record with you?

A. Yes.

Q. And did you also make a further check to find if there was another party that accompanied Mr. Bennett at your hotel? [377]

A. Yes, I have.

Q. And do you have that record with you?

A. Yes, I have.

Mr. Yeager: May I have it, please.

The Clerk: Government's Identifications Nos. 53 and 54.

(Testimony of Beulah Whispell.)

(Room registration cards from Fifth Avenue Hotel were marked Government's Identification No. 53 and Government's Identification No. 54.)

Q. (By Mr. Yeager): Miss Whispell, I hand you Government's Identification No. 53; will you identify that, please?

A. That is a registration card for J. J. Bennett.

Q. I also hand you Government's Identification 54.

A. That is a registration card for Norma Barkly and Mary An Persine.

Q. Will you state whether or not they accompanied Mr. Bennett to your hotel at that time?

A. The registrations were both made at the same time for a party of four. They were paid for by one person.

Q. Who was that person that paid for that?

A. Mr. Bennett paid their room rent.

Q. And these records are kept in your normal course of business; is that correct? A. Yes.

Mr. Yeager: Your Honor, I offer Government's Identifications 53 and 54 into evidence. [378]

Mr. Taylor: We are going to object, your Honor, upon the grounds there is certain writings upon the Exhibits that has not been explained; for the further reason that one of the exhibits, your Honor, or the Identifications is not, does not show any parties connected with this case—Norma Barkly and some other girls. I don't think that connects any-

(Testimony of Beulah Whispell.)

body with this case so far as we can ascertain at the present time. I don't think it would be admissible at this time.

The Court: Objection overruled. It may be admitted.

The Clerk: Identification No. 53 is Government's Exhibit "S"; and Identification No. 54 is Government's Exhibit "T."

(Government's Identification No. 53 was received in evidence as Government's Exhibit "S"; Government's Identification No. 54 was received in evidence as Government's Exhibit "T.")

Q. (By Mr. Yeager): Mrs. Whispell, I hand you Government's Exhibit "S." I wonder if you would explain that, please?

A. What do you want to know about it?

Q. Just explain what is on there, please, to the court and jury?

A. Well, their registration and their home, Irving, Texas, and my record of payment on the back. Notation, wanting a house, and after Mr. Bennett was taken in custody apparently came back and was unable to pay his bill at that [379] time, and made arrangements. That is what this explanation is on the bottom here.

Q. Can you state whether or not he paid for two rooms at that time?

A. He didn't pay for anything at that time. He was broke.

(Testimony of Beulah Whispell.)

Q. At a later time?

A. Yes, he did. He paid for whatever was owing on the two rooms because we happened to have all of the luggage from the two rooms.

Q. Can you state what the numbers of these rooms were?

A. When they registered in, they registered in 404. That was Mr. Bennett, and 401 on the other card. Two days later they moved. Mr. Bennett moved to 405 and the young ladies moved to 404.

Q. I hand you the other Government Exhibit, Mrs. Whispell. I wonder if you could tell me whether or not the persons on there registered in your hotel, at the present time?

A. I couldn't swear to it, no. I couldn't identify any of the bunch except Mr. Bennett by name.

Q. But you know that they did come in as a party; is that correct?

A. They all registered in as a party according to the desk clerk at the time.

Q. And the last Government Exhibit that I handed to [380] you there, Mrs. Whispell, can you give the address and the room number?

A. That was Norma Barkly and Mary An Persine. They registered from Odessa, Texas, and they were registered in 401 and two days later moved to 404 after Mr. Bennett had moved to 405.

Mr. Yeager: That's fine. Your witness, Mr. Taylor.

(Testimony of Beulah Whispell.)

Cross-Examination

By Mr. Taylor:

Q. Bea, did you become acquainted with Mr. Bennett's wife at that time?

A. No, I did not. I don't even know Mr. Bennett's wife now.

Q. You do know that Mr. Bennett's wife was with him in the room?

A. That was my understanding.

Q. And then these other two girls, they had another room and later moved to adjoining rooms to Mr. and Mrs. Bennett?

A. Yes.

Q. How long did they remain there, Bea?

A. I don't remember. It is on the card there. Several days. They remained there until they were picked up. I don't remember what day they were registered in there.

Q. Did you see any conduct on the part of any of these people that would be, that would cause them to be the subject of arrest, Mrs. Whispell? [381]

A. I didn't even see the people before they were arrested at all. I saw nothing from them and the watchman didn't see anything over there out of order.

Q. Kept to themselves as orderly tenants?

A. Yes, they did.

Mr. Taylor: That's all.

Mr. Yeager: That's all. Thank you very much.

(Witness excused.)

Mr. Stevens: Your Honor, at this time I would like the record to show that I am serving on Mr. Taylor government's ten requested instructions in this case. We ask for a continuance until two o'clock.

The Court: Very well. The cause will be continued upon adjournment until two o'clock this afternoon, and the jury will be excused in a moment until two o'clock this afternoon. During the period in between remember not to talk about the case or to permit anyone to talk about the case or the parties within your hearing. Keep your minds perfectly free from an opinion as to the guilt or innocence of these defendants, or any of them, until the case is finally submitted to you.

Make the adjournment until two.

The Clerk: Court is recessed until two o'clock.

(Thereupon, at 11:30 a.m., a recess was taken until 2:00 p.m.) [382]

Afternoon Session

(The trial of this cause was resumed at 2:05 p.m., pursuant to the noon recess.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Stevens: Yes, your Honor.

Mr. Taylor: Defendants are ready.

The Court: Very well. Call your witness.

WALTER R. BROWN

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Mr. Stevens: Will you hold that right about two inches from your mouth, please.

Q. Will you state your name, please?

A. Walter R. Brown.

Q. Where do you live, Mr. Brown.

A. Odessa.

Q. Odessa, Texas? A. Yes, sir.

Q. And did you live in Odessa, Texas, in June of 1953? A. I did. [383]

Q. Did you know Mr. James Bennett there?

A. I knew of him. I didn't know too much about him.

Q. Is that Mr. Bennett sitting at the table?

A. Yes, sir.

Q. Do you know Betty Bennett?

A. Yes, sir.

Q. And did you know, or did you see Marilyn Jean Casey in Odessa, Texas?

A. I don't know about that name.

Q. This is Government's Exhibit "R," Mr. Brown. Do you recognize that girl?

A. Yes, sir. I seen her once or twice.

Q. Where did you see her?

A. I seen her come by the Highway Courts, the Highway Courts once or twice.

(Testimony of Walter R. Brown.)

Q. The Highway 80 Courts?

A. Yes, sir.

Q. And where was that?

A. In Odessa, Texas.

Q. And who was she with at that time?

A. I seen her with Mr. Bennett.

Q. Did you know the name of any other girl that was there at the Highway 80 Courts at that time with Mr. Bennett?

A. Well, not with Mr. Bennett. I know some more girls was there.

Q. Was there anyone else there with Mrs. Bennett, Betty Bennett? [384]

A. I seen another girl there with Betty Bennett.

Q. Who was that girl? A. Sharon.

Q. Sharon? A. Yes.

Q. And what did you do at the Highway 80 Courts, Mr. Brown?

A. I portered part time.

Q. You were the porter part time, is that your testimony, Mr. Brown? A. Yes, sir.

Q. Did you have anything to do with Betty Bennett while you were down there working at the Highway 80 Courts?

A. Yes, sir. She worked at the Highway 80 Courts.

Mr. Taylor: Just a moment, Mr. Brown. Your Honor, I am going to object to the line of questioning upon the grounds that this is a deliberate attempt on the part of the government to prejudice the jury against Mrs. Fern Bennett, attempting to

(Testimony of Walter R. Brown.)

discredit her credibility prior to her testifying on the stand, your Honor. We feel it is entirely out of order, improper, and the evidence adduced here is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. (By Mr. Stevens): What did she do at the Highway 80 Courts, Mr. Brown; what did Betty Bennett do there? [385]

A. She was a prostitute there.

Q. And did you have any connection with her?

A. No, sir, I didn't.

Q. Well, as a porter at the Highway 80 Courts, did you derive any money from these prostitution activities? A. Yes, I did, once.

Q. How did that come about?

A. Well, while the main porter was gone.

Q. And how did you get the money?

A. I just went up and asked them for it.

Q. Asked who for it? A. Betty.

Q. And why was that? A. Sir?

Q. Why did you have the money coming to you from Betty Bennett? A. From dates.

Q. Well, how did you know that she had had a date?

A. Well, I would send guys around there to the other porter and he would take them around.

Q. And did you receive some money from Betty Bennett? A. Yes, I did once.

Q. Mr. Brown, this is Government's Identification "E"—15—

The Clerk: That is an Exhibit now. [386]

(Testimony of Walter R. Brown.)

Q. (By Mr. Stevens): Exhibit "15"; do you know who that is?

A. One of them is Jack Bennett. I don't know who this lady is, I don't believe. Can't tell with the glasses on.

Q. Do you recognize either of the two women sitting in the first row of the courtroom on your left over here?

Mr. Stevens: Your Honor, may we ask Mrs. Bennett and Miss Crosby to stand, please.

Mr. Taylor: Your Honor, I believe it would be more a fair proposition to have this witness point them out instead of having them stand.

The Court: Very well. I will follow that.

A. Well, I know them.

Q. (By Mr. Stevens): Do you know Betty Bennett? A. Yes, sir, I know Betty.

Q. Well, point them out, will you, please.

A. Right there on the end over there.

The Court: Walk over close to her so we can see what you mean.

Q. (By Mr. Stevens): Walk right over to the person you know as Betty Bennett, will you, please. You can't take that microphone with you. Just walk right over to them.

A. This is Betty and this is Sharon.

The Court: Just a minute. Point out the girl. Go right over close to her. [387]

Mr. Brown: This is Betty.

Q. (By Mr. Stevens): And who is the other girl? A. I know her as Sharon.

(Testimony of Walter R. Brown.)

Q. Fine. Will you take your witness chair back again, Mr. Brown, please. Did you know what kind of a car Mr. Bennett had in June of 1953?

A. Well, all I know about Mr. Bennett while I was there he was some kind of used car dealer. He was buying cars and selling them in Lubbock the way I understood, so that is about all I know about him.

Q. Can you tell us, did you ever see him driving a car?

A. Yes, sir. I seen him drive several different cars. I seen him drive an Oldsmobile once, twice; and I seen him driving a Cadillac once or twice, and a, I believe that is the only two cars I ever seen him drive.

Q. Did you ever see a two-tone Mercury at the Highway 80 Courts, a new Mercury?

A. Yes, sir. I seen it there once or twice.

Q. What color was it?

A. Well, I don't exactly remember, but it was two-tone.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. You say your name was Walter Brown? [388]

A. Yes, sir.

Q. Is that your right name?

A. Yes, sir. Walter R. Brown.

Q. What? A. Walter R. Brown.

Q. Walter R. Brown, and you was a porter at a place called the 80 Courts?

(Testimony of Walter R. Brown.)

A. I was part-time porter.

Q. And when did you first go to work there, Mr. Brown?

A. Well, I never was employed at the Highway 80 Courts. I just worked part time to help another boy.

Q. Well, now, when did you first, the first time that you ever went to work there?

A. Well, I don't exactly remember.

Q. Well, you don't remember whether you were working there in June of 1953?

A. Yes, I were working there then.

Q. Did you work there in May of 1953?

A. Yes, sir.

Q. Was you working there in April of 1953?

A. Yes, sir, I was working there. Let me see, end of Christmas.

Q. Christmas of 1953?

A. And '52, too, I believe.

Q. You was there Christmas '52?

A. I think I started along about then. [389]

Q. When did you first get the job at the 80 Courts?

A. Oh, I started about November in '52, November, December.

Q. And who give you the job?

A. The head porter over there at the Highway 80 Court.

Q. How many porters did they have there?

A. One.

(Testimony of Walter R. Brown.)

Q. Was that an auto court? A. Yes, sir.

Q. And how many accommodations did they have at this auto court? It was a motel, is that what it was? A. Yes, sir.

Q. And how many porters did they have there?

A. They just had one.

Q. That was the head porter?

A. Yes, sir, and I just worked, you know, helped him.

Q. And what time of the day did you work?

A. I would go to work around 7:30, eight o'clock in the afternoon.

Q. Seven-thirty or eight o'clock in the afternoon? A. Yes, sir.

Q. And then how late would you work at night?

A. Some nights I worked till twelve or one; some other nights I worked till three.

Q. Sometimes you worked four, five, seven hours a night? [390] A. Sometimes.

Q. And how many nights a week?

A. Well, sometime I worked three nights a week; sometime I worked four nights a week.

Q. And then did you work that regularly from the time that you went there in November of 1952?

A. No, sir, not that.

Q. You have other jobs?

A. I had another job I worked.

Q. And when did you take the other job?

A. I take another job in '50. I worked on it till '53.

Q. When did you take the other job?

(Testimony of Walter R. Brown.)

A. In '50.

Q. 1950? A. Yes, sir.

Q. A job other than working at the 80 Courts?

A. I was working on the other job all the time.

Q. Oh, this was just an added odd-time job, was it? A. Yes, sir.

Q. A few hours a week you put in?

A. Yes, sir.

Q. And who owned the 80 Courts?

A. Hattie DeYoung.

Q. What were your duties there?

A. At the Highway 80 Courts?

Q. Yeah. A. I just rented rooms. [391]

Q. Now, when did you first see Betty Bennett at the Highway 80 Courts?

A. Well, I don't remember just when the first time I seen her. I seen her there about once or twice.

Q. She was there about once or twice all the time you were there?

A. Just stopped there with her car.

Q. Just stopped there with her car?

A. Yes, sir.

Q. And so from the time that you went to work there in '52 up until the time that you came up here you saw Betty Bennett about twice at the Highway 80 Courts; is that right?

A. Yes, sir.

Q. And was she with Mr. Bennett either time that she was there?

A. No, sir, I never seen her with him.

(Testimony of Walter R. Brown.)

Q. Now, you said that you saw a car, a two-tone car; do you remember what the color of that two-tone car was? A. No, sir, I don't.

Q. Do you know what make of car it was?

A. It was a Mercury.

Q. What?

A. It was a Mercury to my knowledge.

Q. And you say you saw Mr. Bennett at some-time with an Oldsmobile?

A. Yes, sir, he had an Oldsmobile. [392]

Q. He had a Cadillac? A. Yes, sir.

Q. And what other kind of a car did he drive?

A. Well, I seen him drive—well——

Q. He have a Chev? A. Sir?

Q. He had a Chevrolet, too?

A. No, sir, I never seen him drive a Chevrolet.

Q. Chrysler?

A. No, but I heard him say once or twice that he was going to pick up some cars the next day.

Q. His business was selling cars?

A. Yes, sir, that's what I understood.

Q. Did you ever buy a car from him?

A. No, sir.

Q. So he was engaged in the used car business; is that right? A. Yes, sir.

Q. Did he come to the Highway 80 court at times?

A. Well, he came there about once or twice to spend the night.

Q. And that was the only time you ever seen Mr. Bennett there? A. Yes, sir.

(Testimony of Walter R. Brown.)

Q. Are you still working there?

A. No, sir. [393]

Q. How long ago did you quit?

A. I quit right about, right back about November or October last year.

Q. Now, Mr. Brown, I am going to hand you Plaintiff's Exhibit "R" and ask you to look carefully at that photograph and I want you to tell me truthfully whether or not you have ever seen that girl before, ever seen the original of that picture?

A. I seen the girl that reminds me of her. I mean I couldn't swear to her. I mean she was a blonde-headed girl.

Q. And where did you see a blonde-haired girl that looked like that?

A. I seen one one time came by with Mr. Bennett.

Q. You ever been in Galveston?

A. No, sir.

Q. What? A. No, sir.

Q. Now, if the evidence should show here that that girl was from Galveston would you say that you had seen her at Highway 80 courts?

A. Well, all I could say, I seen a girl that looked like this. reminded me of this girl.

Q. It just reminds you of this girl?

A. Yes, sir.

Q. And you don't know whether you seen that girl at the Highway 80 Courts or not; is that right? [394]

A. Well, if it wasn't her—I never said I seen

(Testimony of Walter R. Brown.)

her in the Highway 80 Court. I said I seen her with Mr. Bennett one night.

Q. What night?

A. I don't know just what night it was.

Q. Well, what month was it?

A. I don't remember. Just before I quit out to the Highway 80 Court.

Q. That would be along the last of October or November?

A. Yes, sir, he drove by.

Q. So you saw this girl with Mr. Bennett out at the Highway 80 Court sometime in October or November of 1953; is that right?

A. I seen a girl that looked like her.

Q. Now, you don't know whether that is the girl or not though. Now, what was the girl's name that you say looked like the picture? Did you ever hear her name spoken?

A. Yes, sir, I heard the name mentioned one time.

Q. What was it?

A. I don't remember right now. I knew.

Q. Isn't it a fact, Mr. Brown, you don't remember ever seeing that girl at all, do you?

A. Well, just like I told you, I seen a girl that looked like her, I mean reminded me of her. Of course, it don't have to be her because when I seen her she didn't look like this. [395]

Q. She looked like somebody that you had known, but she didn't look like that; is that right?

A. I mean her face reminded me.

Q. What was the difference in the face?

(Testimony of Walter R. Brown.)

A. Well, I guess her hair ain't fixed the same way, or something.

Q. How did the one that you knew fix her hair?

A. I believe she wore it in an upsweep.

Q. An upsweep, and was it that color?

A. Yeah, it was a blonde-haired girl.

Q. You realize girls can change the color of their hair at the drop of the hat, can't they?

A. They can do that.

Q. Now, Mr. Brown, you said you saw Mrs. Fern Bennett at this Highway Court a couple of times, and you saw Mr. Bennett there a couple of times; is that right?

A. Yes, sir.

Q. Now, who did you first talk to about this case, Mr. Brown, before you left Odessa?

A. Well, this case here, I don't know the guy's name. Somebody come to my house and asked me did I know the girl.

Q. Asked you if you knew that girl?

A. I don't think they had a picture of this girl here.

Q. Did they give a description of the girl that you was supposed to know?

A. Yes, sir. [396]

Q. And did you tell them you knew a girl like this?

A. I told them I seen him with a blonde-headed girl one night, came by the store there, but that is all I knew about it.

Q. And who was the man that came to see you?

A. Well, I think it was Mr. Wright and some other law from——

(Testimony of Walter R. Brown.)

Q. How long ago was that?

A. Oh, that was about, approximately three months ago, four.

Q. Mr. Wright you say?

A. Yes, I believe it was.

Q. He is a—what does he do?

A. What do he do?

Q. Yeah. A. I don't know.

Q. Is he in Fairbanks at the present time?

A. I think he is.

Q. Who met you at the plane, Mr. Brown?

A. Well, I don't know the guy's name, some U. S. Marshal.

Q. And have you talked to anybody since you came into Fairbanks?

A. Yes, sir, I talked to the U. S. Marshal.

Q. To the Marshal; that all?

A. Well, I seen all of them, the FBI man. [397]

Q. They all been on your trail, have they, Walter? A. Yes.

Q. And what did they tell you that they wanted you to talk about?

A. Oh, they, all they told me was that they asked me some questions and I told them all I could say is what I know, what I don't know I couldn't say it.

Q. And about all you have testified to what you don't know here is about what you know; is that right? A. Well, I told you all I know.

Q. You know that you saw this girl with Mr. Bennett in October or November of 1953 in Odessa?

(Testimony of Walter R. Brown.)

A. I didn't say that. I said I seen a girl that reminds me of this.

Q. A girl that looks like that? A. Yes.

Q. And you saw Mrs. Bennett at the Highway 80 Courts a couple of times during the period you worked there; is that right? A. Yes, sir.

Q. And you saw Mr. Bennett come there a couple of times during the time you worked there?

A. Well, he stayed there one night, and one night he just came by.

Q. One night he stayed there and the other night he didn't stay; is that right. [398] A. No, sir.

Q. Did you ever see him around in Odessa?

A. No, sir.

Q. And is that the only two times you ever saw Mr. Bennett? A. Yes, sir.

Q. And do you know which one of the gentlemen sitting at the table over there is Mr. Bennett?

A. Yes, sir. I don't forget a face.

Q. Which one is it; the man on the right or the left? Oh, not this fellow here next to Mr. Rivers?

A. Yes, sir, that is Mr. Bennett right there.

Q. You recognize him from the time he came out there to Highway 80 Courts?

A. Yes, sir, the night he stayed out there I mean. I talked to him. I know I gave him Room 7.

Q. One time he had a Cadillac; one time he had an Oldsmobile; is that right?

A. Yes, sir, he told me he just bought that Olds-

(Testimony of Walter R. Brown.)

mobile, was going to put it up on a lot in Lubbock or Amarillo somewhere.

Q. Is that the only time you ever talked to Mr. Bennett? A. Yes, sir.

Q. You talked to Mr. Wright since you been in town? A. Yes, sir.

Q. And did he tell you what you was supposed to testify here today? [399]

A. No, sir. He just asked me did I remember him, and I told him I did.

Q. That is if you remembered this girl?

A. No, he didn't ask me anything about that girl.

Q. Just asked if you remembered Betty Bennett and who else?

A. And Jack Bennett and Sharon. I told him I remembered them.

Q. That was all. That's all that you remembered then. Now, was these, was Jack Bennett and that other gentleman sitting over there, or Mrs. Bennett or that other girl, were they pointed out to you out here in the hallway before you came into here, this courtroom? A. No, sir, they wasn't.

Q. And were they pointed out to you after you came in the courtroom? A. No, sir.

Q. Were you told who they were?

A. I knew them.

Q. You knew Mr. Bennett, Mrs. Bennett and that other girl, whatever her name was—what was her name? A. Sharon.

Q. When did you leave Odessa, Mr. Brown?

(Testimony of Walter R. Brown.)

A. I left on the 12th.

Q. The 12th of May? A. Yes, sir. [400]

Q. By air, I suppose? A. Yes, sir.

Q. Now, you state you got some money from Betty Bennett one time? A. Yes, sir, I did.

Q. Did you get money from other people that came to the motel? A. I have.

Q. And did you get any regular salary?

A. Yes, sir.

Q. And was this money you got, was that tips?

A. Well, I wouldn't say that. I just—the other guys told me to go around and collect some money. That's what I did.

Q. Oh, that was the money for the motel?

A. Well, I don't know for the motel or not.

Q. What?

A. Just told me to go around and collect some money. That's what I did.

Q. How much did you collect?

A. I don't know, twenty-five, thirty dollars.

Q. And they owed twenty-five or thirty dollars?

A. I don't know what they owed. That is what they gave me.

Q. And how much did you get of that?

A. I didn't get none of it. [401]

Q. Now, isn't it a fact, Mr. Brown, that you got part of the money that you—

A. I was supposed to have, but I didn't.

Q. Well, you had your hands on the money, didn't you? A. Yes, sir.

(Testimony of Walter R. Brown.)

Q. How did you happen to let it slip through your fingers?

A. The other porter went to eat.

Q. The other fellow went to eat?

A. Take the money with him and he didn't come back.

Q. You was left holding the bag; is that right?

A. Yes, sir.

Q. And did he ever pay you? A. No.

Q. Do you know how much the total bill was at the time that you collected twenty-five or thirty dollars? A. No, sir, I don't.

Q. Did this man that sent you to collect, did he tell you how much they owed? A. No, sir.

Q. Just told you to go collect? A. Yes, sir.

Q. And it was for rent of the motel, was that right?

A. I don't know what it was for. I didn't ask him that.

Q. Did they serve liquor at that motel? [402]

A. Well, if they wanted it, get it for them.

Q. Oh, you would go get it for them?

A. Yes, sir.

Q. But they had no liquor at the motel itself; is that right? A. No, sir.

Q. And if they wanted liquor you go get it then, sell it to them? A. Yes, sir.

Q. A little bootlegging on the side, was it?

A. Yes, I guess that is what you call it.

Q. I suppose you want to get back to Odessa, do you, Walter? A. Yes, sir.

(Testimony of Walter R. Brown.)

Mr. Taylor: Well, as far as I'm concerned, you can go right now.

Mr. Stevens: Maybe you should take a bow, Mr. Taylor.

Redirect Examination

By Mr. Stevens:

Q. Now, Mr. Brown, did you ever send a man to Betty Bennett for the purpose of prostitution?

A. Well, the other guy, he worked on the back and I just turned around to him and he just turned them over to the girl.

Q. And is that what you collected the money for from [403] Betty Bennett, for sending the men around there?

A. Well, I don't know. I didn't send the man directly around there, but the other guy sent him around there and he told me that is what it was for.

Q. He told you to collect your share?

A. No, he told me to collect from the girl and he would be back in a few minutes.

Q. And you did collect from her?

A. Yes, sir.

Q. Now, this girl that looks like the girl that was with Mr. Bennett, you told Mr. Taylor you thought you saw them sometime around October or November; is that right?

A. Yes, I guess that is about when it was.

Q. Do you remember when all these people left Odessa? A. No, sir, I don't.

Q. Do you remember when the last time you saw Mrs. Bennett down there, Betty Bennett?

(Testimony of Walter R. Brown.)

A. No, sir, I don't believe I remember when the last time was.

Q. Well, are you sure about those times. If the record here shows that they weren't in Odessa there, were you sure that you saw them then in October or November?

A. I'm pretty sure I seen them somewhere along in there. I mean I couldn't swear to that because I don't remember that far back.

Q. Now, do you remember seeing the two men you say you saw? Mr. Wright was one of [404] them?

A. Yes, sir, I remember Mr. Wright.

Q. And do you know Mr. Dahl down there?

A. Yes, sir.

Q. Do you know what his business is?

A. Yes, sir.

Q. What is his business?

A. Mr. Dahl is law, some kind of law.

Q. Is he the FBI Agent down there?

A. Who, Mr. Dahl?

Q. Yeah. A. No, sir.

Q. You don't know him as the FBI Agent?

A. No, sir.

Q. Do you know who Cap West is?

A. Who is that?

Q. Captain West? A. Yes, sir.

Q. Who is he?

A. He is the law that came to my house.

The Clerk: Government's Identification No. 55.

(Statement signed by Walter Brown was marked Government's Identification No. 55.)

(Testimony of Walter R. Brown.)

Q. (By Mr. Stevens): Do you remember the exact time that you saw Mr. Bennett down there?

A. No, sir, I can't remember the exact [405] time.

Q. Did you tell the officers that came to see you, did you tell them that the time you told them, did you tell them the right time; did you remember then?

A. Well, I told them close that I could remember. I told them that. I'm not awfully sure. That was a guess at it.

Q. This is Government's Identification 55, Mr. Brown; do you recognize that?

A. Yes, sir, I recognize this.

Q. Did you sign that statement?

A. Yes, I signed it.

Q. Is the date on the front page of that statement the right date, Mr. Brown?

A. Yes, I believe it is.

Q. Well, that was sometime in October, wasn't it?

A. Yes, sir.

Q. Well, then, it must have been sometime before that that you had seen Mr. Bennett?

Mr. Taylor: Just a moment, your Honor. I am going to object to the suggestive questions.

The Court: Objection sustained.

Q. (By Mr. Stevens): Now, Mr. Brown, after you refreshed your recollection then, do you remember when you did see Mr. Bennett and these girls in Odessa?

Mr. Taylor: Just a moment, Mr. Brown. I am

(Testimony of Walter R. Brown.)

going to object to the question as this witness hasn't testified [406] that he needed something to refresh his memory and we are going to object to him testifying from this piece of paper. I think it is improper.

The Court: Lay your foundation.

Mr. Stevens: Very well, your Honor. Just hold that up there for a minute, Mr. Brown.

Q. (By Mr. Stevens): All this that you have told us, do you remember the dates just exactly right now, without looking at that paper?

A. I don't believe I do. We can try and see.

Q. And did you put down the dates on that statement; was that statement made prior to coming before this court?

A. I didn't put the dates down, no, sir, but they was put down.

Q. And who put those down?

A. Mr. Wright.

Q. And where was that?

A. When they put them down?

Q. Yeah. A. In Odessa.

Q. And is that when you said before when they came to your house?

A. Yes, sir, they came to my house. I wasn't at home. It was out of their way, so they came to my job and got me.

Q. Everything that is on that statement is right? [407]

A. Well, I see one thing on here about some other girl. I mean I told them I didn't know any-

(Testimony of Walter R. Brown.)

thing about her, but I think he got it down here that I did.

Q. Which girl was that? Don't look at the statement.

A. Well, I don't know who the girl was, but he said, I think a blonde-headed girl. I told him I seen her once, but that is all I know about her.

Q. Well, let's put it this way then, Mr. Brown. Do you remember how long before you made this statement that you had seen Mr. Bennett?

A. Must have been two or three months I know, because I had been working on the other job about three months.

Mr. Stevens: Your witness, Mr. Taylor.

Recross-Examination

By Mr. Taylor:

Q. Mr. Brown, did you state in response to a question by Mr. Stevens there was things down on that paper that you had not told them?

A. I see one thing down here that I told them I didn't know nothing about this other girl, but sometimes——

Q. What did they do, just tell you to leave it on there, let it go as it was?

A. Well, he was writing it I guess.

Q. So somebody else wrote that out, did they, Mr. Brown? A. Yes, sir. I signed it. [408]

Q. They wrote it out and you signed it. They put their own words on there, did they?

A. Yes, sir. I see they put one word on here.

(Testimony of Walter R. Brown.)

Mr. Stevens: Your Honor, before Mr. Taylor takes this move, I think that he should inform this witness that the appearance of this girl has changed considerably and there is evidence before this court to that effect.

The Court: Well, he can examine her whatever way he sees fit.

Mr. Stevens: Well, he is examining one witness and he is bringing another witness before the court. Mr. Taylor is the one that has invoked the rule. I have no objection to his showing this witness Marilyn Jean Casey, but I am going to insist on his laying the proper foundation before he produces her. Miss Casey is a witness before this court and I am going to exclude any other witness from this court while another witness is testifying.

Mr. Taylor: Marilyn Casey is an exhibit, not a witness, your Honor.

Mr. Stevens: You can say that again, Mr. Taylor.

The Court: Call your exhibit.

(At this stage in the proceedings, the witness Marilyn Jean Casey entered the courtroom.)

Q. (By Mr. Taylor): Mr. Brown, would you take a look at that lady and state whether you have ever seen her before?

A. No, sir, I never seen her. [409]

Mr. Taylor: That's all.

Mr. Stevens: Just a moment, Marilyn. Just stay right there.

(Testimony of Walter R. Brown.)

Redirect Examination

By Mr. Stevens:

Q. Mr. Brown, do you know this girl is the same girl that is in that picture?

A. No, sir, I didn't know that.

Mr. Stevens: That's all.

Mr. Taylor: That's all.

(At this stage in the proceedings, the witness Marilyn Jean Casey withdrew from the courtroom.)

(Witness excused.)

Mr. Taylor: Could we have the recess now, your Honor. It is getting kind of stuffy in here.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 2:57 p.m., the court took a recess until 3:02 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Stevens: The government rests, your Honor.

Mr. Taylor: Your Honor, I would like to make a [410] motion in this case out of the presence of the jury, and I also have one witness I would like to call now to take her testimony and then in the

event that the court overrules the motion, we will have the testimony in court.

The Court: Can't you put the witness on in the usual order and then if you find you are going to use him then put him on?

Mr. Taylor: Well, he goes to work in a short time, your Honor, and I think possibly this argument—we would just like to have his testimony and in case we don't need it, we will have it anyway.

The Court: Very well. Call him.

Mr. Taylor: Mr. Burney, please.

ACEL BURNEY

a witness called on behalf of the defendants, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please.

A. Acel F. Burney.

Q. Where do you reside, Mr. Burney?

A. Working at the Capri Cafe in Fairbanks.

Q. And how long have you lived in Fairbanks?

A. Well, let's see. I have been here since February 20th.

Q. What is your occupation? [411]

A. Cook.

Q. And do you have any other occupation but cook?

A. Well, sometimes I lay block, in the middle of the summer for a construction company. That's all, sir.

(Testimony of Acel Burney.)

Q. Where did you live prior to coming to Fairbanks? A. In Anchorage.

Q. And what occupation did you follow in Anchorage?

A. Well, I was driving a cab there, sir.

Q. Are you acquainted with Wesley Kehert, the gentleman sitting at the end of the table?

A. Yes, I am.

Q. How long have you known Mr. Kehert?

A. Well, let's see. I have known Mr. Kehert around about three years.

Q. Were you living in or around Anchorage during the month of May, 1953? A. Yes.

Q. And now, during that month did you see Mr. Kehert?

A. Mr. Kehert was, I was driving cab and Mr. Kehert was working at the Green Lantern at a night club there, a waiter there.

Q. How often did you see Mr. Kehert during the month of May, 1953?

A. Well, every night, sir, I was there.

Q. And then would you say that Mr. Kehert throughout the month of May, 1953, was residing in Anchorage? A. Yes, I would. [412]

Q. And you saw him practically every day for, during the month of May?

A. Yes, and I believe if I get my dates correct, him and I lived together the last two weeks of May at the Lone Star Motel there.

Q. You occupied the same room?

A. Same apartment, yes.

(Testimony of Acel Burney.)

Q. And did he continue to live in Anchorage after the month of May?

A. Well, I believe I moved out. It was around about the 2nd or 3rd of June, and I seen Steve two or three times after that, but then I went to work on another job and I didn't see him after that and haven't seen him since.

Q. Then before the first of May how often had you seen him at that time?

A. Well, I think he was working around—let's see. He was working at this Green Lantern, seemed to me like it was close to two months.

Q. Do you know of a Cafe or Club there named the Bell and Whistle?

A. Well, used to be the old Green Lantern. That's the same Club.

Q. The Bell and Whistle and the Green Lantern are one and the same? A. Yes.

Q. Who is operating it?

A. Larry Sears. [413]

Q. Now dead? A. Now dead, yes.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. You say you lived together for two or three weeks?

A. I believe it was a couple of weeks, sir.

Q. And where did you live?

A. North Star Motel.

Q. And where is that?

(Testimony of Acel Burney.)

A. In Anchorage. It is out on, I think they call it Potter Road. It is the highway to Seward there, sir.

Q. Did you know that gentleman sitting on the end of the table by another name than Kehert; what name did you know him by?

A. Well, I knew him by Kehert, Steve.

Q. Steve what?

A. Steve Williams, I believe. Yes.

Q. And did you know a girl that he was engaged to at that time?

A. Well, at that time Steve and I, we was kind of playing the field at that time. We was kind of romancing around. We didn't have many steady girl friends.

Q. Well, was he engaged to a girl down in Texas?

A. I couldn't say for sure. I didn't ask him his business. [414]

Q. What was his business?

A. Well, his business, he was a waiter there at the night club where he was working there at the Green Lantern.

Q. Drove cab, too, once in awhile?

A. Steve?

Q. Yes.

A. I don't recall him ever driving a cab there, no.

Q. Did he have any connection with prostitution? A. With what?

Q. Prostitution.

(Testimony of Acel Burney.)

A. Well, not that I know of.

Q. Do you know when he went back to Texas?

A. No, I didn't. I was out of town, but I know that he couldn't have left until the, if he went to Texas at all he couldn't have left there until after the first of June, I know.

Q. And do you know whether he did go to Texas?

A. I don't know where he went, to be frank with you. This is the first time I had seen him for, Oh, I don't know, for quite sometime. I got out on these camp jobs at Whittier; then I come up here and worked for awhile. I worked at Elmendorf and haven't seen anybody.

Q. Were you—where did you work last summer?

A. Wright Constructions Company at Anchorage.

Q. When did you start to work there?

A. After I quit driving cab. It was around September the first. I was laying block and it rained so much I couldn't work. [415]

Q. Do you know whether or not Mr. Williams, as you knew him, made any trips to Texas during the first part of the year of 1953?

A. I don't think he did.

Q. He was in Anchorage all the time?

A. I believe so, yes.

Q. And he wasn't connected at all with prostitution?

A. Not that I know of, no.

Q. He didn't drive any cabs?

(Testimony of Acel Burney.)

A. He didn't drive any cabs to my knowledge.

Q. He was working for a man that is now dead?

A. He was working for Larry Sears, yes, that is now passed away.

Q. Will you, did you know Mr. Kehert when he got in trouble down in Anchorage?

A. Was he in trouble in Anchorage?

Q. Well, did you know him in April and May of 1953? A. Yes.

Q. And did you know him well at that time?

A. Yeah, I heard something about a little beef out there. I don't know—something about a cabin or something like that. I didn't pay any attention to it. It was none of my business.

Q. When was that?

A. Oh, that was, it must have been the first part of the year, around in May or April, sometime in there. [416]

Q. Was that near the time that you were living with him?

A. No, he wasn't in no trouble when I was living with him.

Q. Was that after he was in trouble that you were living with him?

A. I was living with him. I guess if he was in trouble that must have been after, because he wasn't in no trouble when I was living with him.

Q. How long did you know him?

A. Seemed to me it was close to two months. My memory is kind of bad. I used to see him every night there for a month or so, I know.

(Testimony of Acel Burney.)

Q. Well, is your memory such that you could say for sure that you saw Mr. Kehert there the last two weeks of May?

A. Oh, positively. I know he was there the last two weeks of May, yes.

Q. And you know that he was not in Texas?

A. Well, I would go so far as to say he wasn't in Texas the last two weeks of May. I know he wasn't. I would have to dig down, get my rent receipts, but I am pretty sure that he wasn't.

Q. Where did you live before you came to Anchorage? A. Where did I live?

Q. Yes.

A. Well, I left Tule Lake, California, when I come to Anchorage. [417]

Q. Where did you live before that?

A. I lived all over. Let's see. I was in La Grande. I left La Grande, Oregon.

Q. Did you ever know Mr. Kehert in the states?

A. No, I don't recall that I ever knew him there.

Q. Do you know Mr. Bennett?

A. No, I don't know Mr. Bennett.

Q. Do you know Mr. Taylor, the attorney here?

A. No, I don't know him.

Q. Never saw him before today?

A. Never saw him before today, no.

Q. And have you ever been convicted of a crime?

A. Well, I was bootlegging in Portland one time. I got arrested.

Q. Did you ever live in Odessa, Texas?

(Testimony of Acel Burney.)

A. Never been in Texas, sir.

Mr. Stevens: I believe that is all.

Mr. Taylor: That's all. I would like to excuse Mr. Burney so he can go to work.

Mr. Stevens: Well, I will excuse him, but I may want to call him back tomorrow.

The Court: What time do you want him to report tomorrow?

Mr. Stevens: Well, I don't know as yet. I will call him if I want him.

The Court: All right.

(Witness excused.) [418]

The Court: You wish to make a motion now, Mr. Taylor?

Mr. Taylor: Yes, sir.

The Court: The jury will be excused until notified to return to the courtroom.

(Thereupon, the jury withdrew, and the following proceedings were had out of the presence and hearing of the jury.)

The Court: You will be limited to ten minutes to a side in this argument.

Mr. Taylor: O.K., your Honor.

If the court please, at this time I would like to move this court for an order for a judgment of acquittal of the defendants of the crime charged in Count I of the Indictment and also make the same motion, your Honor, as to a judgment of acquittal of the crime charged in Count II of the Indictment.

Now, your Honor, in relation, in reference to Count I of the Indictment, we do not feel that there is sufficient evidence to allow the case to go to the jury in view of the fact that the only testimony as to transportation was the testimony of a government witness, Marilyn Jean Casey, who stated that she initiated a trip to Alaska from Texas, and the trip was not through any solicitation or urging of any of these defendants; that she said that she wanted to come to Alaska as she wanted to get away from Texas for awhile. Now, that is the only evidence, your Honor, and there is an attempt [419] on the part of the government to impeach their own witness by a statement that she made under duress while being held in jail and after several days of pounding by the FBI, the Deputy Marshals, the Assistant United States Attorney, who, although they claim that it was a free and voluntary statement, your Honor, I believe the facts surrounding—

The Court: Now, I don't care to have you waste time arguing that question again. I have ruled on it already.

Mr. Taylor: Well, just arguing the evidence, your Honor, here to substantiate our claim in regard to lack of evidence.

The Court: Well, make a short statement of any reference to that.

Mr. Taylor: If the court please, I would like to call the court's attention to *United States v. Biener*. That is 52 Federal Supplement 54. I believe that is a case from Pennsylvania, the District Court.

The Circuit Court of Appeals or District Court in Pennsylvania who held that in a prosecution for transporting a woman in interstate commerce for immoral purposes, where the government had no evidence to sustain the verdict of guilt other than a written statement of the witness which was repudiated by witness prior to trial and during trial, motion for arrest of judgment was granted.

Now, your Honor, that case is right in point with the present instance. Miss Casey made her statement before the FBI after five or six hours of questioning. She has testified [420] in this case to an opposite set of facts under oath, your Honor, so that the only thing they have at this time, your Honor, is a statement made by Marilyn Casey to the FBI, a written statement not sworn to, to sustain a verdict of guilty, so if this evidence was submitted to the jury, your Honor, and the jury found these defendants guilty under the rule of the case I just cited, *United States v. Biener*, that case, your Honor, would be subject to reversal.

Now, in this case at bar, there is certain evidence of, I believe, two isolated cases of intercourse on the way from Texas up here, between Mr. Kehert and Miss Casey, but in the case of *United States v. Grace*, 73 Federal Second 294, the court held that "If interstate journey was planned with no immoral purpose at time, no crime was committed since immoral relation, standing alone, unconnected with interstate commerce, does not violate federal statute."

And in *Long v. United States*, 160 Federal Second

706, the court held if the sole purpose of interstate commerce, or interstate journey with a woman or girl is legitimate, a purely incidental intent to have intercourse en route is not a federal offense. Now, there is another case right in point on this same thing. And also, in the case of *Shannon v. United States*, 92 Federal Second, Page 1, the court held it is the inducement and the transportation, not the subsequent conduct which constitutes an offense under the White Slave Act, so in this case, your Honor, they [421] have shown not one scintilla of evidence that there was an inducement on the part of any of these defendants to get Marilyn Casey into the Territory of Alaska. In fact, the inducement was on the other side. She wanted to come to Alaska and asked if she could ride with these four defendants and another girl, Carrol Ward, who was with them.

I have some other citations, but the short time that the court give, I don't believe I will have time to go into those, although I would like to call the court's attention to the case of *Thorne v. United States*, 278 Federal 933, the court held that where the girl insisted that they make the trip to another state the evidence was held insufficient to sustain a conviction. Now, in this case, the girl initiated the ride to Fairbanks, not Mr. Kehert or Mr. Bennett or Mrs. Bennett or Norma Crosby.

Now, in *Yoder v. United States*—that's 80 Federal Second at 665, the court said that under a statute condemning transportation of female in interstate commerce for immoral purpose, prospect of

sexual relations must have some relation to and be one of the reasons for or purposes of the trip; but if the sole purpose of the trip was legitimate, purely incidental intent to have intercourse is not a federal offense. The courts have held that as strictly a matter for local prosecution and not a matter for Federal prosecution.

Now, in this case, your Honor, each and every one of these defendants must have had a guilty knowledge of the [422] purpose for which Marilyn Casey was brought into the Territory. Otherwise you could not convict them.

Now, in regard to the second Count in this case, your Honor, I contend that there has not been one scintilla of evidence to show that the four defendants were acting in consort, that even by their actions or by words there is nothing to show that there was any conspiracy entered into by and between those people.

Now, in this case, the witness Marilyn Casey, wanted to come up. She did ride with them with their permission, with permission of the three girls and the two defendants here, but a person would have to indulge in conjecture and conclusion, your Honor, and only by a stretch of imagination could you say that there was a conspiracy, that their had been a meeting of the minds or that there had been any overt act to carry out any if there was an intent to start in with, to carry it out, and I would like to call the court's attention that in this particular instance it states that on the 28th day of

June, 1953, they did conspire to bring a girl from Texas to the Territory of Alaska, and on the 28th day of June, your Honor, they were all four of them were in the Territory of Alaska. There could have been no conspiracy.

We feel, your Honor, that in view of the law and the facts in this case that the court should direct a judgment of acquittal as to both Counts I and II of the Indictment.

The Court: All right, Mr. District [423] Attorney.

Mr. Stevens: Before I begin, your Honor, I would like to ask Mr. Taylor for that citation again on this 92 Federal Second 1 is what I took it as. I have 92 Federal Second here, and the case Number 1 does not pertain to the case that he cited.

Mr. Taylor: Which case was it?

Mr. Stevens: The second case you cited, Mr. Taylor, 92 Federal Second, Page 1. No. 94 Federal Second, Page 1.

Mr. Taylor: I might have called that off 92, but it was 94 Federal Second. That was an Iowa case.

Mr. Stevens: Now, your Honor, we are acquainted with 52 Federal Supplement, Page 54, *United States v. Biener*, in which the District Court in Pennsylvania did grant a motion in arrest of judgment in a case very similar to this, but I would call your Honor's attention particularly to Page 55 where the judge stated the following facts: "At the trial she testified that when she signed this statement she had been taking narcotics by reason of illness and pain; that the statement had been prepared by one of the government agents; that she

had informed the agents she had an appointment with her physician to obtain narcotics and that it was fifteen minutes past the time of her appointment; that she explained to the agents that she was signing it so that she could get away and keep her appointment, and that the agents drove her to her physician's office a few minutes after the statement was signed." Then it goes on and says "Subsequently, when she was confined in a hospital for illness, she was visited [424] by one of the Federal Bureau of Investigation agents who had taken the statement, and she again told him at that time that she would not testify to the alleged facts appearing in the written statement because they were not true."

We do not believe this is the same case here, your Honor. Miss Casey, for a period of almost four months, maintained that the statements in her original statement were true. Up until August she was still directing the Federal Bureau of Investigation to more facts to substantiate her statement. She was not taking narcotics. She was not under any doctor's care. She was not so ill she did not know what she was doing. In that case, the Judge said because there was not other evidence to substantiate the statement made by the witness that he was forced to grant a motion in arrest of judgment.

Now, in this case, the government has gone to great lengths and great expense to prove that Miss Casey in fact told the truth the first time that she told the story to the FBI. We have brought people in from Texas, from Denver, from the—from Brit-

ish Columbia, a border town at the American-Canadian border. We brought in the American Immigration Inspector at Tok and we have proved that Miss Casey's activities around here were as she originally described them. I point out to you that Miss Casey herself was responsible for locating Mr. Hudson, who testified before this court that he had in fact had intercourse with Miss Casey as an act of prostitution. [425]

We believe that this case of *United States v. Biener* is not at all similar to the case before the court.

Now in regard to the other statements of law which Mr. Taylor has cited to the court, and again we say we are not familiar with 94 Federal Second, Page 1, but we have already quoted to the court *Aplin v. United States*, Ninth Circuit Court case in 1930, concerning transportation from Salem to Chico, where the court said that the "purpose or intent is generally proved by circumstantial evidence, and may be so proved under all the authorities." We believe that we have gone through this case with the idea of proving purpose and motive and that it must be proved by circumstantial evidence particularly in a case such as this where the purpose is the element of the crime charged.

We have charged these defendants with transporting Marilyn Casey for the purpose of prostitution. It is their intent that we are after. We don't care about Marilyn Casey at all. The government would prefer to view her as an exhibit, as a matter of fact, and we believe that we have shown that her

activities in Texas were activities of prostitution; that the activities of Mr. Bennett and Mr. Kehert and these two defendants who are women were activities related to prostitution in Texas before they came here. We have shown that their activities after they arrived in Fairbanks were activities related to prostitution. From all those facts, and the facts that we have set forth that these defendants, Mr. Bennett and Mr. Kehert, drove separately across the two borders, the only [426] two places, your Honor, on the trip where records would have been made as to who was actually present in each of the three cars. In those two instances Mr. Bennett and Mr. Kehert came through the checking station alone and the four women came together. We believe that that is an element that the jury may take into consideration, and putting all of the facts together we believe that there is sufficient evidence before this court to make this a case to go to the jury. It is a jury question of fact as to whether or not the transportation was in fact for the purpose of prostitution, and we call your Honor's attention to the fact that it is not necessarily, it is not necessary for the government to prove that the only purpose of the trip was prostitution. It may be that these people actually wanted to come to Alaska also, and that their purpose was to get from Texas to Alaska, but if one of their dominant motives was for Marilyn Casey to engage in prostitution after she came to Alaska, then the government has shown its case and if the jury believes that beyond a reasonable doubt they

may return a verdict of guilty against these defendants.

Now, in regard to the conspiracy charge, I will call your Honor's attention to *Wright vs. United States*, 175 Federal Second, Page 384, an Eighth Circuit case in 1949. In that case what the defendants had done was they had taken a woman from Houston, Texas to Texarkana, Texas and let her walk across the line into Arkansas. They drove her bags up [427] to the hotel. She walked up to the hotel. And the defendants were convicted and the court on appeal stated that one who aids or brings about the transportation is guilty as if he physically and personally carried her across the line. We believe that that is in point in this case because if any of these defendants brought about the transportation of this woman across those lines in interstate commerce or for that matter, if they brought her in transportation within the Territory of Alaska, the government has proved its case.

I called your Honor's attention specifically to the fact that the White Slave Act is in force throughout the Territory of Alaska. Federal jurisdiction exists in Alaska without proving transportation in interstate commerce and for that reason we believe that we have shown to the jury that there was in fact transportation for the purpose of prostitution before they reached Fairbanks, and if the jury finds that, they may convict these defendants.

Now, from the government's point of view, the leading case, the most recent case that is, leading case, involved in this subject of white slavery, is

Dunn v. United States, and in that case, that was the Tenth Circuit, your Honor, the issues before that court were almost precisely the same as the issues before this court. They had motor lodge registrations. They had the issue of whether or not the single element of purpose need be proved. They had the issue of whether or not the accused must have the purpose and also the issue of [428] whether or not the victim, that is the person transported, must also have the purpose to enter into prostitution, and the court also, as we said before yesterday, I believe it was stated that circumstantial evidence may be used to prove the necessary intent and purpose and motive and I quote, "As bearing upon that essential element of the offense, the conduct of the parties within a reasonable time before and after the transportation may be taken into consideration."

We also have a case involving the conspiracy charge, your Honor. I believe I cited that to the court yesterday, if I have not cited it to the court in government's requested instructions, and we believe that we have shown sufficient evidence to the court to allow the case to go to the jury at this time, and to allow the defendants to go ahead with their part of the case, if they desire to do so.

Thank you, your Honor.

The Court: The motion will be denied. Call the jury.

(Thereupon, the jury re-entered the court room, and the following proceedings were had within the presence and hearing of the jury.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well. Call your witness.

Mr. Taylor: If the court please, we have some evidence coming from Anchorage; got a telephone call today that [429] it will be in on the evening plane, and we would like to adjourn until ten o'clock tomorrow morning.

The Court: Don't you have witnesses to go ahead right now?

Mr. Taylor: No, sir.

The Court: You mean to say you have no witness you can put on now at all?

Mr. Taylor: I would like to get this evidence from Anchorage first and then I will know whether I am going to call either one of the defendants, your Honor.

The Court: Very well. I will grant the motion, and in a moment we will adjourn. This case will be adjourned until ten o'clock in the morning. In the meantime, ladies and gentlemen of the jury, remember not to talk about the case or the parties to the case or to permit anyone to talk about them within your hearing. Keep your minds perfectly free from an opinion as to the guilt or innocence of these defendants, or either of them, until the case is finally submitted to you.

Make the adjournment until ten o'clock in the morning, Mr. Clerk.

The Clerk: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:15 p.m., the trial of this cause was adjourned until May 14, 1954, at 10 a.m.) [430]

Be It Remembered, that upon the 14th day of May, 1954, at the hour of 10 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendants both represented by counsel, the Honorable Hary E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Stevens: The government is ready, your Honor.

(At this stage in the proceedings, Mr. Taylor entered the court room.)

Mr. Taylor: Sorry, your Honor. My watch is five minutes slow.

The Court: Very well. Counsel agreeable that all members of the jury are in the box now?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Are you ready to continue the trial of 1817 criminal, United States against Bennett, et al.?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Government is ready, your Honor.

The Court: Very well. Proceed.

Mr. Taylor: I will call Mr. Bennett, your Honor. [431]

JAMES J. BENNETT

one of the defendants, was duly sworn as a witness in his own behalf, and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please.

A. James J. Jefferson Bennett.

Q. And how old are you, Mr. Bennett?

A. Thirty-six.

Q. And where do you reside at the present time?

A. Anchorage, 233 Barrow.

Q. And where were you born?

A. Hopkins County, Texas.

Q. And you lived in Texas most of your life?

A. Most of it, yes.

Q. And what is your present Texas address?

A. 505 North Tom Green Street, Odessa, Texas.

Q. And you have relatives living in Texas at the present time?

A. I do.

Q. Who?

A. Father.

Q. And how long have you been a resident of Alaska?

A. A little better than five years in and out.

Q. And where has that residence been?

A. Anchorage.

Q. And are you married, Mr. Bennett? [432]

(Testimony of James J. Bennett.)

A. Yes.

Q. And what is your wife's name?

A. Fern Bennett.

Q. And you are the defendant in the case, one of the defendants in the case on trial at the present time?

A. I am.

Q. Now, Mr. Bennett, were you engaged in business in Odessa, Texas, before coming to Alaska?

A. I was.

Q. And what was that business?

A. Buying and selling automobiles.

Q. Have you ever followed that occupation in Alaska?

A. Well, yes, to some extent. I am working now for new and used cars in Anchorage, 4th and "A," Joe D. Blachard.

Q. That is buying and selling?

A. Buying, yes, sir. I have only sold two outside of my own merchandise.

Q. Now, are you acquainted with Marilyn Jean Casey who testified on the stand a few days ago, Mr. Bennett?

A. Yes.

Q. Where did you first meet Miss Casey?

A. In Galveston.

Q. And about when did you meet her?

A. Well, the last time was about the 20th of June, I think, somewhere along in there, 18th to the 20th of June. Around the 18th or 20 of June, 1953. [433]

Q. And who, if anybody, was she with at the time you met here then?

(Testimony of James J. Bennett.)

A. I don't remember for sure, several people.

Q. Did you see Mr. Kehert at that time?

A. Yes.

Q. And how did you, how did you happen to be in Galveston, Mr. Bennett?

A. We were just vacationing there for three or four days.

Q. And you met Miss Casey while you was on that vacation in Galveston? A. Yes.

Q. And do you know whether or not Mr. Kehert had known Miss Casey before?

A. It was my understanding that he had known her before.

Q. And how long did you remain at Galveston on that trip?

A. I think we were in Galveston three days.

Q. And how much of that time were you around with Miss Casey?

A. Well, I only saw Miss Casey the last night I was there.

Q. And the time you were there, did you have any conversation with Miss Casey about your coming to Alaska? A. I did not.

Q. You know whether Mr. Kehert had any conversation with Miss Casey about coming to [434] Alaska? A. I do not.

Q. You heard none anyway?

A. I heard none.

Q. And then when you left Galveston, why where did you go? A. To Odessa.

(Testimony of James J. Bennett.)

Q. And who was in the car with you when you went back to Odessa?

A. Mr. Kehert and Miss Casey.

Q. And how did Miss Casey happen to be going back to Odessa with you?

A. Well, I don't know that.

Q. And after you got to Odessa, did you have any conversation with Miss Casey in regard to coming to Alaska?

A. Well, there was conversation. She wanted to go along. She had the money to pay her part of the expenses.

Q. And at that time was any conversation had regarding her entering into prostitution in Alaska?

A. None.

Q. And were you coming back to Alaska at that time to resume your business at Anchorage?

A. I was going back to Anchorage to drive cab.

Q. And you had a car of your own, did you?

A. I did.

Q. That you were going to drive back?

A. Yes, sir. [435]

Q. What was the make of that car?

A. It was a 1951 Cadillac.

Q. And was your wife going to come back to Alaska with you? A. Yes.

Q. What kind of a car, if any, did she have?

A. 1953 Mercury.

Q. And what kind of a car did Mr. Kehert have?

A. 1953 Buick.

Q. And after you got back to Odessa how long

(Testimony of James J. Bennett.)

did you remain there before you left Odessa for Alaska?

A. Overnight. That afternoon and night.

Q. Now, calling your attention to the afternoon of the day prior to your leaving Odessa, did you see a man named Wright who testified on the stand here?

A. I did not.

Q. And when had been the last time that you saw Mr. Wright?

A. It had been several days. He had been by to get me to call Ft. Worth to finance a car for him. The bank had taken over everything he had and closed him out there. He didn't even have an automobile to drive to town.

Q. Now, Mr. Bennett, you was in the court room when Mr. Wright testified here day before yesterday?

A. I was.

Q. And you heard his testimony regarding a visit he made to your apartment in Arrowhead Apartments, I believe? [436]

A. I did hear that.

Q. And at the time he stated that Mr. Kehert was present at your apartment?

A. He did state that.

Q. Was Mr. Kehert present in the apartment?

A. No.

Q. Did you see a laundry truck drive up to in front of your apartment?

A. I did. That afternoon it was a cleaner's truck.

(Testimony of James J. Bennett.)

Q. Cleaner's truck, and who was driving that cleaner's truck?

A. Max Hallmark that owns the Rainbow Cleaners and Laundry Service.

Q. And did he own the company that owned the car?

A. Yes, sir. They own three companies there.

Q. And did he come into your apartment?

A. He delivered some clothes to the back door, yes, sir.

Q. And did you see at any time Mr. Kehert drive a laundry truck up to your——

A. No, sir, Mr. Kehert never came in any laundry truck.

Q. So Mr. Wright's statement then that Mr. Kehert drove the laundry truck when he came in was an untruth then? A. It was untrue.

Q. And in fact was Mr. Kehert in Texas on the 18th of May, as Mr. Wright testified to?

A. No, Mr. Kehert was in Anchorage on the 18th of May. Mr. Kehert never got to Texas until June 3rd or 4th. [437]

Q. And how did he arrive in Texas?

A. He came by plane until he bought a car.

Q. After you heard Mr. Wright's statement about your leaving Odessa in a hurry. You have any information, Mr. Bennett, that the Texas Rangers were after you? A. I did not.

Q. Did you know there were Texas Rangers at Odessa? A. I know them all.

(Testimony of James J. Bennett.)

Q. And now how long had you known Mr. Wright?

A. Well, a couple of months. I had known him over five or six years as a loan shark around town. He loaned small loans to most all those colored people there.

Q. And did you know of him going into the undercover work for the Narcotics Bureau?

A. Well, I think he made a false statement there. He was a city policeman, hired by the City Manager and the Chief of Police and paid from the City Patrol and I think if they will check that they will find it true.

Q. And when did you first learn that he was working under cover?

A. I think it was on the 4th day of April, 1953, that he had been hired. He had been hired the night before.

Q. And then his statement that you did not know that he was an undercover agent until the night before you left Texas was incorrect then?

A. It was very incorrect, yes. [438]

Q. What was Mr.—do you know Mr. Wright's general reputation for truth and veracity in the community in which he lives?

A. Yes.

Q. And what is his reputation for truth and veracity.

A. Well, it is pretty bad among the people that I know, and I know most all of them there.

Q. You lived at Odessa for quite some time, have, you, Mr. Bennett?

(Testimony of James J. Bennett.)

A. About twenty years.

Q. And now, when you left Odessa what route did you take coming back to Fairbanks?

A. 287.

Q. And where did you go to on Route 287?

A. Well, there was some smaller highways, I guess you might call it. The main thoroughfare, I don't remember the number, but I always cut across, get on 287 and then go right to the Canadian Customs that way. That is about the shortest route.

Q. Where did you stop the first night?

A. Denver, Colorado.

Q. And what hotel did you stop at?

A. The Royal.

Q. And how many rooms did you reserve there?

A. Two.

Q. And do you know where Mr. Kehert stopped? [439]

A. Not exactly, I don't know. I wasn't in his cottage. It was over on the other side of town on the highway. It was on the main highway.

Q. And how long did you remain in Denver?

A. Well, I would say probably around sixteen hours, I suppose. We got in there, stayed overnight and left the next day.

Q. About what time did you get there?

A. I don't remember. It was in the afternoon.

Q. Well then these rooms, these two rooms you got, was one of them for you and your wife?

A. One for my wife and myself.

Q. And who was the other one for?

(Testimony of James J. Bennett.)

A. For Miss Crosby and Miss Ward.

Q. And then after the next day did you have your car serviced?

A. I had my two cars serviced that day, that afternoon.

Q. The afternoon that you got in?

A. Yes.

Q. And when did you leave Denver?

A. Around noon the next day, or a little after.

Q. And which way did you go then?

A. Cheyenne.

Q. Did you stop any length of time in Cheyenne? A. No.

Q. Where was the next place that you stopped overnight? [440]

A. Washington, I think. I'm not sure.

Q. Do you remember what town in Washington?

A. Spokane, I think. I wouldn't be positive.

Q. And then after you left Spokane where did you hit the Canadian border?

A. Osoyoos, or something like that.

Q. And you went through the Canadian Customs at that place? A. I did.

Q. And did you and your party make any attempt to conceal the fact that you weren't together?

A. Not at all. I told the agent checking my car that the red car belonged to me, give him the papers on both of them. My wife took the papers on the coupe and the lady checked her and the guy checked me.

Q. And then you went on after you left there,

(Testimony of James J. Bennett.)

you went on, proceeded up to Canada to the point at Snag? A. Yes.

Q. How many days did it take you to drive up?

A. Approximately six, I think.

Q. And you stopped along the different places on the highway? A. Yes.

Q. And taking six days you took the, took it fairly easy coming up through Canada?

A. Yes, sir, the road is pretty bad through there. [441]

Q. And you stopped, taking pictures?

A. Sure did.

Q. Now, who did Marilyn Casey ride with?

A. Well, she rode with the girls part of the time, and with Kehert part of the time. Everybody. It was a long, tiresome trip and we were just more or less visiting to break the monotony of the trip.

Q. Kind of move around from car to car; is that right? A. Yes, sir.

Q. And you got to where was the control point when you come into Alaska, from Canada?

A. Tok.

Q. At Tok, do you know how far that is from the Canadian border?

A. I don't. It is about a hundred miles, a hundred eighty, something like that. I don't know for sure. I have been through there several times, but I don't remember.

Q. Well, now after you got past the customs office at Tok you came on into Fairbanks?

A. Yes.

(Testimony of James J. Bennett.)

Q. And what did you do when you came to Fairbanks?

A. Went to the Fifth Avenue Hotel, got a place to stay.

Q. And had you ever stopped there before?

A. No.

Q. And you got two rooms at the Fifth Avenue, did you? A. I did.

Q. One for yourself and wife? [442]

A. That's right.

Q. And the other for the two girls that were with you? A. Yes.

Q. And do you know where Miss Casey went?

A. No, I do not. I didn't see Miss Casey after that until I seen her in the jail.

Q. And then you had no further, no interest in Miss Casey after she once got here?

A. None whatsoever.

Q. And after you came into Fairbanks then, what did you do, Mr. Bennett?

A. I went to see two people that own cab here about getting my car on, and they weren't using any lease cars, and I was making preparations to go to Anchorage the day before we got arrested.

Q. And where were you arrested, Mr. Bennett?

A. At the Fifth Avenue Annex.

Q. And who made the arrest?

A. Mr. McRoberts came in there and got us first and took us to the jail and booked——

Q. By us, who do you mean?

(Testimony of James J. Bennett.)

A. Mrs. Bennett and Miss Ward.

Q. And yourself? A. Yes.

Q. And where did he take you?

A. He took us to the Federal jail. [443]

Q. And what did he do when he got you there?

A. They booked us in; after they locked the girls up, he said, "Just a minute, don't lock Bennett up. I am going to take him back to the room a minute."

Q. And then what did he do?

A. He took me back down to the room and sat down, and said, "I think the FBI will be here for you in a few minutes. I understand they have a warrant for you." While we were in the jail there he made a call. I don't know who the call was made to.

Q. So he took you back so the FBI could arrest you while you were already in custody then, Mr. Bennett? A. Yes, sir.

Q. And when the FBI came, it was just you and Mr. McRoberts present in the room. A. Yes.

Q. Was that Ted McRoberts or Mike McRoberts?

A. Yes, Ted McRoberts, the guy whose hair stands up straight.

Q. Was he scared you think, make his hair stand up? A. I don't know about that.

Q. So then the FBI came in; what did they do?

A. They knocked on the door, pushed it open real quick, jumped inside. They said, they showed their book, who they were and I told them to come on in. I didn't have anything to hide.

(Testimony of James J. Bennett.)

Q. And then what did they proceed to do? [444]

A. Well, they pushed me over against the wall. One of them stood there while the other one shook me down.

Q. And then what did they do?

A. They read the Warrant to me and handed it to me, and I read it. I said, "Well, let's go."

Q. Did they proceed to search the room?

A. They did.

Q. And during this search what did they secure, any articles of yours?

A. Yes. I had receipts for courtesy card gasoline purchase laying on the chest of drawers up on top along with an address book, a 380 automatic which wasn't loaded or didn't have any clip in it, and they took those and my wife and the other girls had washed out some clothes in the bathtub in my room and were hanging up and McRoberts gathered up the wet clothes along with the dry ones, also a bundle of dirty clothes that was laying in the corner and took them all down. He still has them till now.

Q. Still got those clothes?

A. Still have them.

Q. Mr. Bennett, did you ever get a receipt from either Mr. McRoberts or the FBI for the things they took out of that room?

A. I never got no receipt for them.

Q. They took the guns?

A. Two guns, I had a rifle there, .22 rifle. It wasn't loaded either, but they took it anyhow. [445]

(Testimony of James J. Bennett.)

Q. And did they ever give the guns back?

A. Finally Mr. Miller got the guns back for me, yes, sir.

Q. And what were you charged with at that time, Mr. Bennett, in that Warrant that was served on you?

A. It said aiding and abetting, aiding and abetting.

Q. Did it say aiding and abetting what?

A. I don't remember that. I don't never talk to them people very much. He had a Warrant. I told him, "Let's go."

Q. So you got no receipt for the things, did you?

A. No receipts, no, sir.

Q. And have you ever got your, any of the articles other than the two guns back?

A. Not anything but the two guns.

Q. And the girls have not got their clothes back?

A. They did not get their clothes back.

Q. And there was a preliminary hearing, was a preliminary hearing ever held on the charge against you, Mr. Bennett?

A. Yes, sir.

Q. And were you present at that preliminary hearing?

A. No, sir.

Q. You were not?

A. I was present at the first one.

Q. And what was the outcome of that preliminary hearing?

Mr. Stevens: I object to that. If he wasn't present it would be hearsay, your Honor. [446]

The Court: Objection sustained.

(Testimony of James J. Bennett.)

Q. (By Mr. Taylor): You say you were present at the first preliminary hearing?

A. I was present at the first preliminary hearing, and they dismissed it at the last preliminary hearing.

Mr. Stevens: I move to strike that, your Honor, unless he shows the proper foundation.

The Court: It may be stricken.

Q. Well, was it continued at the first hearing?

A. Yes, it was continued thirty days, I believe it was.

Q. And you did not appear for the next hearing then? A. No.

Q. You do not know that the charge was dismissed then? A. Yes, it was dismissed.

Q. And was your bond exonerated?

A. Yes.

Mr. Stevens: I object to this, your Honor. He is going into hearsay testimony, and Mr. Taylor realizes that it is hearsay testimony. I have objected twice. I ask your Honor to instruct Mr. Taylor to ask his witness questions which will not go into hearsay matters. Mr. Bennett was not present at the preliminary hearing and he does not know of his own knowledge what went on down there.

The Court: Objection is sustained. Consider yourself informed to refrain from those hearsay questions. [447]

Mr. Taylor: Yes, your Honor. I have asked that question, the fact that being a defendant I felt,

(Testimony of James J. Bennett.)

your Honor, that he should know whether he had been discharged and his bondsmen exonerated. That is the only thing I was trying to bring out.

Q. (By Mr. Taylor): Mr. Bennett then, do you know whether or not your bondsmen were exonerated on the charge upon which you were arrested?

A. They were. I was notified by my bondsman that his bond had been returned, that he had been exonerated from the bond.

Mr. Stevens: Your Honor, what is that but hearsay? Now Mr. Taylor knows that he did not know that of his own knowledge. It was told to him by someone else. Mr. Taylor persists on going into hearsay evidence.

The Court: Not necessarily. He might have gotten the information from someone else.

Mr. Stevens: That is hearsay, your Honor. He did get the notice.

The Court: That is hearsay, yes.

Q. (By Mr. Taylor): Then after that, Mr. Bennett, did you, when was the first knowledge that this matter had been brought up again?

A. A letter from your office that they returned a secret indictment, return to the Territory. That was in [448] November, the first of December, last of November, I believe it was.

Q. And then pursuant to that letter that you received you returned to the Territory?

A. I did return to the Territory. I figured it would be cheaper to handle it, me being here than it would be outside, and then have to come back.

(Testimony of James J. Bennett.)

Q. You had in the meantime, had you posted another bond? A. Since then?

Q. No, at the time that you found out that you were to be arraigned, that an indictment had been returned against you, did you post another?

A. I made preparations to post a bond.

Q. And I believe that you were arraigned at Anchorage, Alaska, were you? A. Correct.

Q. Now, Mr. Bennett, at any time from the time that you met Miss Casey at Galveston, did you have any conversation with Miss Casey regarding her coming to Alaska for the purpose of practicing prostitution? A. I did not.

Q. And did Miss Casey at any time inform you that she wanted to come to Alaska for the purpose of prostitution, for purpose of going into prostitution? A. She did not. [449]

Q. Did you have any talks with her as to what line of business she expected to go into in Alaska?

A. She was talking about she was a dancer, going to work at some Squadron Club or the Bell and Whistle or something like that. I don't know, some dancing establishment, B-girl or something like that.

Q. And that was—was this the extent of her intentions so far as you know as to what she expected to do in Alaska?

A. So far as I know, yes. I had very little conversation with Miss Casey.

Q. Did she ride in the car with you at any time?

(Testimony of James J. Bennett.)

A. Not at no time was she ever in my car.

Q. And did you ever have a private conversation with Miss Casey or was it in the presence of the group?

A. I never had no private conversation with Miss Casey at no time.

Q. And while the group was together, Mr. Bennett, Miss Casey and any of the group that you was with, your wife or Norma Crosby or Carolyn Ward or Mr. Kehert, any, have any conversation with Miss Casey regarding her coming to Alaska to practice prostitution? A. Never.

Q. Did you hear any talk about her going into the Squadron Club or the Swing and Whistle or the——

A. The conversations I heard her talking was dancing.

Q. And was that, do you know whether she had been a dancer before or not? [450]

A. I understand she had been dancing, doing some shows in some of those swing clubs in Galveston.

Q. Now, when you left Galveston with Miss Casey, did you pick her up with a car?

A. I did not.

Q. And who picked her up, do you know?

A. I don't know. I had been terribly drunk the night before and they came by the room and picked me up.

Q. So you was the one that needed picking up; is that right?

(Testimony of James J. Bennett.)

A. Yes, sir. I lay in the back seat pretty sick all the way home.

Q. Not talking about much of anything; is that right? A. No, sir, I was pretty sick.

Mr. Taylor: You may take the witness.

The Clerk: Government's Identification No. 56 and Government's Identification No. 57.

(Criminal Complaint No. 9733, USA v. Kehert and Bennett, was marked Government's Identification No. 56; Warrant No. 9733, USA v. Wesley Kurt Williams and James J. Bennett was marked Government's Identification No. 57.)

Cross-Examination

By Mr. Stevens:

Q. Mr. Bennett, this is Government's Identification No. 57; have you seen that document before? [451] A. Not to my recollection.

Q. Didn't you say you read the warrant that was given to you?

A. Yeah, I said that the man handed me a warrant.

Q. And it was on the 6th day of July, 1953?

A. I think so.

Q. And the warrant specifically said something about aiding and abetting, did it?

A. I don't know. That is what he told me.

Q. I thought you said you read it?

A. I looked it over, the warrant, and it had my name on it. I handed it back to him and said,

(Testimony of James J. Bennett.)

“Let’s go.” It had my name on it, so I didn’t go no further.

Q. It was read to you, was it not?

A. I don’t remember.

Q. I thought you just said it was?

A. He read something off to me. He said he had a warrant for my arrest.

Q. Who told you something said aiding and abetting on there? Mr. Taylor? A. Harkabus.

Q. You read it at the time?

A. I read a few words of it, handed it back to him, and said, “Let’s go.”

Q. This is Government’s Identification 56, Mr. Bennett, was that ever read to you? [452]

A. Not to my recollection.

Q. Were you ever arraigned before Mrs. Nordale downstairs on the 7th day of July, 1953?

A. I was.

Q. And was the charge read to you at that time?

A. There was some charges read to me.

Q. Anything said about aiding and abetting at that time, Mr. Bennett?

A. I don’t remember.

Q. Where did you get the aiding and abetting, Mr. Bennett?

A. That is what was on the first warrant. That is what they said when they come in the door.

Q. You were being arrested for aiding and abetting, who were you aiding and abetting?

A. I don’t remember. I looked at the warrant and it had my name on it.

(Testimony of James J. Bennett.)

Q. Is your memory as good regarding the warrant as what happened in Texas?

A. I have a pretty good memory.

Q. Is your memory pretty good on where Wesley Kehert was on the 4th, 5th, and 6th of June, 1953?

A. I don't know.

Q. But you saw him on the 3rd?

A. I didn't say I seen him on the 3rd. He left up here on the 3rd. [453]

Q. When did you get to Texas?

A. He got there about the 3rd or 4th.

Q. When did you see him.

A. I didn't see him for a couple of weeks.

Q. Where was he? A. I don't remember.

Q. Where was he on the other end of the phone when you talked to him?

A. I don't remember.

Q. Who called whom; did he call you?

A. He called me, yes.

Q. Did you ever call him? A. No.

Q. So then you don't know where he was?

A. No, I said I didn't know where he called from.

Q. And if he was in Anchorage in June he could have called you from there?

A. He didn't call me from Anchorage.

Q. You sure of that? A. I'm sure.

Q. You been in the business of buying and selling automobiles? A. I have, yes.

Q. Were you in that business down in Anchorage for five years before this?

(Testimony of James J. Bennett.)

A. No, I wasn't. I was driving cab. [454]

Q. I thought you said your business for about five years in and out in Anchorage was buying and selling automobiles?

A. I said my business now in Anchorage, I was buying cars. I said I only sold two and they were mine.

Q. I believe you said you were in Galveston two or three days vacationing?

A. That's right.

Q. Where did you stay, Mr. Bennett?

A. I stayed at a motel out on the beach.

Q. And what was that motel?

A. I'm not sure, but I think it was the Coronado.

Q. Coronado Courts, wasn't it, Mr. Bennett?

A. Courts and motels the same.

Q. And how long did you stay there?

A. Stayed at that place one night, or two nights, I'm not sure.

Q. And where is the other place you stayed in?

A. I stayed over in Ft. Worth the night before I came down there.

Q. I thought you said you stayed in Galveston two or three days?

A. I stayed up one whole day and one whole night up until the next day that I didn't go to the motel.

Q. How many nights were you at a motel in Galveston, Mr. Bennett?

A. Approximately two, but I only stayed there one piece of one night. [455]

(Testimony of James J. Bennett.)

Q. And whose car did you have?

A. We were in Mr. Kehert's car.

Q. Did you make any phone calls from there?

A. Yes, I made a phone call. I called home.

Q. Where else did you call?

A. I don't remember if I called anywhere else.
I think I only made one phone call.

Q. Where did Mr. Kehert call?

A. I don't know nothing about Mr. Kehert's business.

Q. Weren't you there with him?

A. Sometimes I was, and sometimes I wasn't.

Q. You travel with him for three days' vacationing and you don't know anything about his business?

A. I tend to my business and let everybody else do the same.

Q. Were you on business or vacationing?

A. I said I was vacationing down in the bars, drinking them up.

Q. Then when Miss Casey went back with you, you didn't know how she got there; is that right?

A. I didn't care to know.

Q. Well, when was the first time you found out she was going with you to Alaska?

A. When they came by the room to pick me up. I was too sick to get up and go. I got up and laid down in the back seat of the car and vomited nearly all the way to Odessa. [456]

Q. Did you have have any connection with prostitution in Odessa, Texas, Mr. Bennett?

(Testimony of James J. Bennett.)

A. I had no connection with it, no.

Q. Well, did you know that Miss Crosby and your wife were engaging in prostitution in Odessa, Texas?

A. I did not.

Q. That's not true then; is that right?

A. I don't know anything about it. I was in and out. I was going to Chicago and then I was on the road with automobiles most all of the time.

Q. With automobiles, Mr. Bennett?

A. Yes, with automobiles.

Q. Anyone in those automobiles with you?

A. Well, several people would be picked up to drive them through.

Q. Again my question is, when was the first time you found out Miss Casey was going to Alaska with you?

Mr. Taylor: Just a moment, your Honor. It has already been answered.

The Court: He may answer again.

A. First time I seen Miss Casey when they came by the room. First time I knew anything about any Alaska business was in Odessa.

Q. (By Mr. Stevens): And who was there then?

A. I don't remember everybody that was [457] there.

Q. Was your wife there?

A. I couldn't say truthfully.

Q. Was Mr. Kehert there?

A. I don't know for sure.

Q. You just don't know anything for sure then, do you, Mr. Bennett?

A. I don't know that.

(Testimony of James J. Bennett.)

Q. Who owned the Mercury, Mr. Bennett?

A. The title to it was in my wife's name.

Q. And where was the address on the title; what was the address on the title?

A. I don't know whether it was an Irvin address or an Odessa address. We owned a home in both places.

Q. Do you own a home in Waxahachie?

A. No, I bought the car down there.

Q. Did you register it down there?

A. Yes, the dealer has to register a car in the county it comes out of in order to replace it.

Q. Did you show that your address was down there when you bought it down there?

A. No. The way that was, the Motor Investment paid off for the car, and they billed the car out. The invoice was to me, and the title was put in her name.

Q. And where was the address on the title?

A. I don't remember.

Q. You bought it, didn't you? [458]

A. I paid cash for it.

Q. Did you buy it? A. Yes, I did.

Q. You put it in your wife's name?

A. I sure did.

Q. You are the person who filled out the paper?

A. The clerk in the Lincoln-Mercury office filled out the papers.

Q. Did you tell him the address?

A. He had the address. I bought a number of automobiles there.

(Testimony of James J. Bennett.)

Q. The title, your wife's address for the title, did you tell him that?

A. I told him to put the title in my wife's name.

Q. What is your address in Irving, Texas, Mr. Bennett?

A. Story Road.

Q. And you lived in the Arrowhead Motel in Odessa?

A. I lived in the Arrowhead Motel.

Q. And where else in Odessa?

A. 505 North Tom Green Street.

Q. What is that?

A. That is my home.

Q. And did you ever live in the Highway 80 Courts?

A. I never did.

Q. Never stayed there in your life?

A. I did. [459]

Q. When did you stay there?

A. I don't remember. I stayed there two or three times.

Q. And did you stay at the Davis Motel?

A. No, I never spent the night at the Davis. I have been there. I had an option to buy the place at the time.

Q. Is the place on Tom Green Street in your name now?

A. No, it is not.

Q. Was it in your name when you were living in the Arrowhead Motel?

A. No.

Q. It was your home though?

A. It is in my father's name.

Q. Where did your father live at that time?

A. He lived in the place.

Q. Did he ever stay at the motel?

A. No, he did not.

(Testimony of James J. Bennett.)

Q. Did your father help you pack up when you left the motel? A. He did not.

Q. He didn't help you at all?

A. My Cadillac was over at his house, and he brought it to me.

Q. Did he drive a little ways out on the road with you? A. He brought my car out to me.

Q. And where were you?

A. I was at the Moonlight Bar. [460]

Q. I thought you were at the motel?

A. Not after I left town I wasn't.

Q. Wasn't it a fact that your father had one of your cars just before you left the motel?

A. My Cadillac stayed over at my mother's house all the time.

Q. And you called your father and asked him to bring it to you at the motel?

A. No, my father brought my car out to the Moonlight Bar. It is a whiskey store and bar twelve miles out of town.

Q. Did you father help you pack the cars?

A. He did not.

Q. Did your father put part of the luggage in your car?

A. He didn't put any luggage in my car.

Q. Did you not drive your father's old Buick out to where the Mercury was parked on a road twelve miles from town?

A. I had my father's Buick over at my house.

Q. Where was the red Mercury when you started out on this trip to Alaska?

(Testimony of James J. Bennett.)

A. It was at home.

Q. Was that the motel? I asked you was the red Mercury at the motel when you left the motel?

A. I don't remember.

Mr. Taylor: I believe he should make it a little more explicit, your Honor, ask him about a motel. There has been about three motels that has got into this conversation, and we would like to know which one the District Attorney is referring to. [461]

Q. (By Mr. Stevens): I am referring to the Arrowhead Motel. That is where you lived, wasn't it, Mr. Bennett? Didn't I ask you if you didn't call your father and ask him to bring your Cadillac over to your motel, the Arrowhead Motel?

A. My father brought my Cadillac out to the Moonlight Bar, as I said before.

Q. And where was the red Mercury at that time?

A. I don't know where it was. My wife had it.

Q. Where was the red Mercury when you started off on the trip? A. It was along with us.

Q. Where was it?

A. It was out at the Moonlight Bar.

Q. I thought you said you didn't know where it was? A. At the Moonlight Bar.

Q. I thought you said you didn't know where it was?

A. When I started on the trip it was.

Q. Did you ever go back to the motel to pack your things?

A. My things were packed before I left.

(Testimony of James J. Bennett.)

Q. You were in pretty much of a rush to leave any moment, weren't you?

A. No; I was in a rush to go back to Tennessee after some cars.

Q. Did you know that Norma Crosby was arrested on the 19th of June, 1953? [462]

A. I heard about it.

Q. Were you not in Odessa on the 19th of June?

A. I don't know. I wasn't there when they got arrested. I was out of town.

Q. When did you get back to town on that trip then?

A. Two or three days after that. The day before I left for Alaska.

Q. The 19th is the day you left for Alaska, Mr. Bennett?

A. They was home when I got there, wasn't in no jail then.

Q. What was your room number in the Arrowhead Motel? A. 36.

Q. Did you ever stay in room 27?

A. I did not.

Q. Who stayed in room 27?

A. I don't know for sure.

Q. Well, Mr. Bennett, was your wife arrested on the 19th of June, 1953?

A. I don't know. I didn't see her arrested. She was at home when I got there.

Q. You had no knowledge of it?

A. According to law it would all be hearsay.

(Testimony of James J. Bennett.)

Q. You were pretty free with hearsay a moment ago, Mr. Bennett. Let's have a little now.

A. She wasn't in jail when I got home.

Q. Did you hear she had been put in jail? [463]

Mr. Taylor: We object, your Honor, on the ground it would be hearsay.

The Court: Objection overruled.

Mr. Stevens: I am glad you understand the rule.

Q. (By Mr. Stevens): Now, Mr. Wright, how long did you know Mr. Wright?

Mr. Taylor: Did you call Mr. Bennett, Mr. Wright?

Mr. Stevens: No, I said, and Mr. Wright.

A. I had known Mr. Wright quite some time.

Q. (By Mr. Stevens): And you say you knew the day after he was appointed as an undercover agent for the Narcotics Bureau, you knew it; is that right? A. Yes.

Q. Who told you?

A. The Chief of Detectives on the city told me first that he had applied for the job.

Q. You are pretty much in with those people then, are you?

A. I was raised right there on the streets, and I have been there longer than any of them have.

Q. And is it the habit of people in Odessa to tell just anyone who are the undercover agents?

Mr. Taylor: Your Honor, I think it is incompetent, irrelevant and immaterial, calling for a conclusion of this witness.

The Court: I sustain the objection. [464]

(Testimony of James J. Bennett.)

Q. (By Mr. Stevens): Were you with Mr. Wright on the night of May 15th at the Mink Club in Amarillo?

A. I sure was. I didn't go there with him, but I met him there.

Q. That was Mr. Wright's testimony, was it not?

A. I don't remember what his testimony was, but I remember he was there and I was there.

Q. And Agent Pacinni?

A. Yeah, and I knew who he was.

Q. Who was the girl that was with you?

A. Carrol Ward.

Q. Was that the same Carrol Ward that came up here with you? A. Yes.

Q. And what did she do in Odessa, Mr. Bennett?

A. She didn't do anything.

Q. Where did she live? A. I don't know.

Q. Did she ever stay at the Highway 80 Motel?

A. Not to my knowledge.

Q. Where did she stay just before you brought her up here, Mr. Bennett?

A. She was staying in an apartment. I don't know where.

Q. Where did she stay right after you got up here, Mr. Bennett? [465]

A. Over at the Fifth Avenue Annex.

Q. Right with you? A. Not with me.

Q. You paid for the room?

A. They had their room, their own money. I took care of the bills.

(Testimony of James J. Bennett.)

Q. You paid for the bills coming up, too, Mr. Bennett?

A. They was pooling the money. It wasn't all my money.

Q. How much money did you have when you were arrested, Mr. Bennett?

Mr. Taylor: Your Honor, we are going to object to the question as incompetent, irrelevant and immaterial, has no bearing on the issues.

The Court: Objection overruled.

Q. (By Mr. Stevens): I think I had about six or eight hundred dollars in my pocket.

Q. And how much did Miss Crosby have, do you know? A. Just some change, perhaps.

Q. And how much did Betty Bennett have?

A. I don't know. I don't ever look in the girls' pocket.

Q. Do you know how much Miss Casey had?

A. I don't know. I had nothing to do with Miss Casey whatever. [466]

Q. You had this contempt for Mr. Wright very long, Mr. Bennett? A. Had what?

Q. This contempt that you express here today, have you had that contempt for Mr. Wright for a long period of time?

A. I don't know what you mean by contempt.

Q. You called him a loan shark, I believe, the same words Mr. Taylor used the other day?

A. That or a little less, yes.

Q. And did you think you were on a friendly

(Testimony of James J. Bennett.)

basis with Mr. Wright all during the time down in Odessa?

A. I knew what basis I was on with Mr. Wright.

Q. And did you see Mr. Wright from time to time? A. Several times.

Q. And did you loan him your car?

A. Several times.

Q. And did he come to your place there in the Arrowhead Motel?

A. A few times; three times, I think.

Q. And what was the purpose of his coming to see you, Mr. Bennett?

A. To see what he could find out.

Q. Do you know Mr. Brown, the colored porter?

A. Yes; I saw his brother or the boy that he was working for. I wouldn't say it was his brother, sold him an automobile. [467]

Q. But did you know him down there?

A. Personally? I knew him when I seen him. I didn't know his name was Brown. Walter was all I knew.

Q. Did you see him, did you ever see him at the Highway 80 Motel acting as a porter?

A. I did not.

Q. Then Mr. Brown is also not telling the truth to this court?

Mr. Taylor: Just a moment, your Honor. I am going to object to the question upon the grounds that Mr. Brown, Mr. Brown might see Mr. Bennett but Mr. Bennett might not see Mr. Brown.

(Testimony of James J. Bennett.)

Mr. Stevens: Mr. Brown testified he talked to Mr. Bennett.

The Court: Objection overruled.

A. Mr. Brown never talked to me.

Q. (By Mr. Stevens): How long were you in Denver? A. Over night.

Mr. Taylor: Could we have the recess, your Honor, at this time?

The Court: Yes; ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the court took a recess until 11:13 a.m., at which time it reconvened and the trial of this cause was [468] resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

Proceed, your Honor?

The Court: Proceed, yes.

JAMES J. BENNETT

the witness on the stand at the time the recess was taken, resumed the stand for further

Cross-Examination

By Mr. Stevens:

Q. Mr. Bennett, did you know during all the time that you were seeing Mr. Wright that he was a Narcotics Agent; is that your testimony?

A. I knew who he was. He was a city policeman

(Testimony of James J. Bennett.)

working with a Narcotics Agent.

Q. He was a Special Agent for the Bureau of Narcotics, that was his testimony; do you deny that?

A. I know his testimony. I also know who he was hired by, when he was hired, and the three people that knew he was hired.

Q. Yet he was supposed to be an undercover man, was he not, Mr. Bennett?

A. That's what he thought.

Q. Tell me, Mr. Bennett, have you heard anything about the cases that have come out as a result of Mr. Wright's work?

A. I have heard some of it, yes. [469]

Q. And is it true that Mr. Wright was a very effective undercover man in Odessa?

Mr. Taylor: Just a moment. That would be hearsay, your Honor. We are going to object.

The Court: I will sustain the objection.

Q. (By Mr. Stevens): Now, Mr. Bennett, you were at the Mink Club on what day in May?

A. I don't know what day it was.

Q. Well, how, then, do you know then for sure that Mr. Kehert wasn't in Odessa when you returned that day; you don't remember whether it was May or June you were in the Mink Club, do you?

A. It was in May.

Q. You sure of that now?

A. I'm not sure, no.

Q. Well, then, you don't know for sure whether Mr. Kehert was there when you got back or not, do you?

(Testimony of James J. Bennett.)

A. I know Kehert was in Anchorage in May.

Q. Do you know whether Kehert was in Odessa when you returned from the Mink Club?

A. He wasn't around my place.

Q. And when you came back from the Mink Club you didn't see him that night?

A. I did not.

Q. Was Miss Ward there?

A. Miss Ward was with me. [470]

Q. She came back with you, did she not?

A. I think Miss Ward drove a car back for me that I bought at the auction in Lubbock.

Q. And was Norma Crosby around your apartment that night? A. Not when I got back.

Q. Well, that evening?

A. Not to my recollection.

Q. And was your wife around there that evening?

A. I don't remember if she was there or over to my mother's.

Q. Mr. Bennett, you were coming back to Alaska to drive cab in Anchorage?

A. I was coming back to Alaska to drive my cab, yes.

Q. And you owned a home in Irving, Texas?

A. I do.

Q. And you seemingly have a fairly profitable business of buying cars?

A. Automobile business was off at that time. Everybody was getting rid of stock they had on hand.

(Testimony of James J. Bennett.)

Q. You paid cash for the Mercury, did you not, Mr. Bennett?

A. I paid cash for it, but I got the cash in other places.

Q. What other places?

A. Well, the man that I worked for, you might say my [471] car is more or less a company car. It was in my name. I paid the payments on it; when I used it for business I got mileage on it.

Q. This is in particular reference to the 1953 Mercury which you had in your wife's name?

A. Correct. Motor Investment, 808 Seventh Street, Ft. Worth, paid for it with a check.

Q. And where did you sell that?

A. I sold it here in Fairbanks.

Q. Whom did you sell it to? A. Bramlett.

Q. Who paid whom on that?

A. Mrs. Bramlett paid my wife. They are four months behind on it at the present time and going to have to pick the car up, four months tomorrow.

Q. Isn't it true that Mr. Bramlett paid you the first installment on that car?

A. Mr. Bramlett didn't pay me anything. His wife paid my wife.

Q. And was the car all paid for when you transferred it?

A. No; it was not. I had permission to dispose of it as I did.

Q. But you paid for it in cash?

A. With a check from Motor Investment Com-

(Testimony of James J. Bennett.)

pany made out to me. Then I put a loan against the car at Motor Investment.

Q. Wasn't it a fact you put a loan against all your cars to make the trip to Alaska? [472]

A. I did not. I keep, I already had a loan against my Cadillac. I keep a loan against my cars all the time, all they will stand.

Q. They didn't ask you to buy them?

A. They did not.

Q. Wasn't that your testimony, you bought them for the man you worked for?

A. No, I did not. I said I had bought a car. The man I worked for finances my cars, whereas I don't have any of my own money tied up in it.

Q. Which car did you consider your car at that time? A. Cadillac.

Q. Where is the Cadillac?

A. I have it in Anchorage, Anchorage Paint and Body Shop right now.

Q. Where is the Buick?

A. I do not know.

Q. You said you didn't see Miss Casey after you came to Alaska and checked into the Fifth Avenue Hotel? A. I did not.

Q. When you came to Alaska did you stay in Fairbanks the night you came here; did you stay here that night and permanently thereafter for awhile?

A. I don't remember. I came in one day. I don't know if I went back to Tok that day or if I went back the next day. I don't remember. [473]

(Testimony of James J. Bennett.)

Q. You went back to 40 Miles, didn't you, Mr. Bennett?

A. That is below Tok, yes, started to go back out.

Q. That's right. You went all the way to 40 Mile and stayed there about three days, did you not?

A. I did not. I stayed there one day and came back the next.

Q. Came back up here?

A. Came back right here.

Q. Did you know Ace Burney that was in here yesterday?

A. I did not know him at that time. I do know him now.

Q. Never saw him before?

A. Before when?

Q. Yesterday. A. Yes.

Q. Where did you see him?

A. Anchorage.

Q. How long ago?

A. Oh, possibly three or four months ago.

Q. Did you talk this case over with him, Mr. Bennett?

A. No, I didn't. I never talked to that man about anything. I just knew when he was driving a cab for.

Q. For whom?

A. Smith, Smitty or something like that.

Q. Is that a city cab? A. No.

Q. Is it a cab operated in the city?

A. They unload in the city. [474]

(Testimony of James J. Bennett.)

Q. Are they licensed in the city?

A. I don't know. My two aren't.

Q. Now, you were in Denver how long?

A. Got in there one afternoon, left the next day.

Q. Did Mr. Kehert pick up a money order while you were still in Denver?

A. As far as I know, yes.

Q. And did you all leave Denver at the same time? A. Approximately.

Q. You saw Mr. Artie Reynolds here from Denver, the service station operator? A. Yes, sir.

Q. Did you ever see him before?

A. Yes, sir.

Q. You bought some gas from him?

A. Yes, sir.

Q. Was this the slip you signed when you bought gas from him?

A. It is just like the one I signed.

Q. Well, it has W. W. Bennett's card number on there, doesn't it? A. Yes.

Q. And someone signed W. W. Bennett to it, didn't they? A. I signed a lot of them.

Q. You signed quite a few of them, didn't you?

A. Yes, sir; I have a power of attorney to sign his name to bank draft, courtesy card, hotel credit card. [475]

Q. The man just stamped the credit card down, didn't he?

A. The credit card has a piece of metal on it that lays in his stamp. The piece you see transferred to

(Testimony of James J. Bennett.)

that paper comes off the metal slip and I signed it below.

Q. And the date and the place you buy the gas from is stamped, right?

A. Yes. Some gas stations have a stamp, some don't. Some of them have to write it out in handwriting.

Q. This says the 20th of June, 1953?

A. Yes.

Q. Do you know what day the 20th of June, 1953, was on? A. It was on the 20th of June.

Q. I mean, was it Saturday; was it Tuesday?

A. I don't know.

Q. Would you like to know before I ask you a question about it, Mr. Bennett?

A. I don't see where it would be necessary.

Q. Well, this calendar shows it was on Saturday, just for your information; is that right?

A. That is what the calendar shows.

Q. Well, we won't dispute the calendar, will we?

A. No; I don't think so.

Q. Then this is your registration card from Denver? A. That is my handwriting.

Q. Shows you actually stayed there on the 21st, doesn't it, which would be a Sunday; is that [476] right?

A. That is what it has on it. I don't know nothing about the days, the dates. I know we stayed in Denver one night, got in there one afternoon and left the next day.

Q. You are sure of that? A. Yes.

(Testimony of James J. Bennett.)

Q. You are just as positive about that as you are everything else, Mr. Bennett?

A. That is to the best of my recollection.

Q. How come Mr. Kehert picked up his one thousand dollar money order on a Monday morning, on the 22nd? You didn't leave Denver until the 22nd; is that right? A. I don't know.

Q. Would you like to examine this?

A. I seen it before.

Q. You have seen it before. What exhibit is this, Mr. Hall, do you know? Government's Exhibit "A." You have seen it before?

A. Right here in court.

Q. Well, you know that Mr. Kehert did pick up a money order while you were in town there?

A. I said he did, yeah.

Q. And that is just your testimony in regard to staying in Denver is as truthful as everything else?

A. I said to the best of my remembrance we only spent one night there.

Q. Now, you would like to change it to the best of your memory? You said you stayed there sixteen hours, didn't you? [477]

A. I said sixteen, eighteen hours. Got there one afternoon, left the next afternoon.

Q. The service station shows you got gas on a Saturday, checked in and stayed at the hotel on a Sunday and Mr. Kehert picked up his Western Union telegram and money order on Monday morning, and you were only there sixteen hours. Now,

(Testimony of James J. Bennett.)

Osoyoos, you told the little agent that was in here you saw Mr. Burton?

A. That isn't the agent that checked the belongings in my car.

Q. Oh, it is not? A. It is not.

Q. Then Mr. Burton wasn't telling the truth, either?

A. Mr. Burton didn't tell all the truth. Mr. Burton was in his car down the road ahead of us and followed us for about fifteen miles.

Q. You don't deny he followed you?

A. We did stop.

Q. Were you going over seventy miles an hour, like he said you were?

A. Well, I try to cover that road pretty fast when I get on it.

Q. He wasn't the man that checked you through?

A. He wasn't the man that checked me in. He was in his car.

Q. Now, wait a minute. He didn't testify he was a customs officer? [478]

A. I call them the same thing.

Q. There were two different stations at the Canadian border, are there not?

A. American and Canadian.

Q. There are two different sets of Canadian people, are there not? A. I don't know.

Q. You never talked to Mr. Burton?

A. That man that was here? I never did. He was going home and we went around him.

Q. How did you know he was going home?

(Testimony of James J. Bennett.)

A. Well, I stayed along behind him and passed him again after he pulled into his house and went in. How come I to know he was an officer was he had one of those uniforms.

Q. Everything he told here was the truth except he talked to you?

A. I don't know about that, but he didn't check me through the customs.

Q. Who was with Mr. McRoberts the time he came over to your apartment and picked up the two girls? A. Some highway patrolman.

Q. And was that highway patrolman around when he put you under arrest, Mr. McRoberts?

A. Mr. McRoberts and them boys. McRoberts took us to jail. McRoberts took me back to the room by hisself.

Q. But this highway patrolman was with you when you went over to the jail? [479]

A. I don't remember.

Q. And were you told you were under arrest when you went to jail? A. Yes, sir.

Q. And were you actually started through the booking procedure downstairs?

A. Yes, sir; right at the desk. He took the things out of my pocket and then said, "Just a minute, I'm going to take him back."

Q. Right there? A. Right there.

Q. And where was the highway patrolman then?

A. I don't know about the highway patrolman.

Q. You say Mr. Taylor gave you notice of the

(Testimony of James J. Bennett.)

fact there was a secret Indictment pending against you?

A. Yes; he said an Indictment. Didn't say secret.

Q. Where did you get the word secret then?

A. From A. B. Clark.

Q. Who is A. B. Clark?

A. Federal Officer in Anchorage.

Q. And he told you it was a secret Indictment?

A. Yes.

Q. But you knew about it all the time?

A. I knew there was an Indictment, yes. I think——

Q. You think what?

A. I knew about it about a week, eight or nine days, I think, before we were arrested that it was a secret Indictment. [480]

Q. Are you familiar with secret Indictments, Mr. Bennett?

A. Not before I came to the Territory, no. Very little since then.

Q. Now, you said that Miss Casey said she was going to come up and work at the Squadron Club?

A. Work at a dance.

Q. You said Squadron Club?

A. The Squadron Club was mentioned, and the Bell and Whistle mentioned.

Q. You mentioned it? A. I did not.

Q. You did just a moment here, a moment ago, did you not?

A. I did, but I didn't mention it to Miss Casey.

(Testimony of James J. Bennett.)

Mr. Taylor: Objection, your Honor. That is quarreling with the witness.

Q. (By Mr. Stevens): Mr. Bennett, did you not just testify that Miss Casey told you she was coming to the Squadron Club?

A. The Squadron Club was mentioned, and the Bell and Whistle was mentioned.

Q. You don't understand my question. Did you not testify that Miss Casey told you she was coming to the Squadron Club?

A. I don't remember that. I know the Squadron Club was mentioned. [481]

Q. I am asking you what you said Miss Casey told you? How did Miss Casey know there was a Squadron Club in Fairbanks?

A. I do not know that.

Q. To your knowledge, had she ever been to Fairbanks before? A. I don't know.

Q. Had she ever been to Anchorage before?

A. I don't know that.

Q. Did you know Chief Fenton, too, Mr. Bennett?

A. You mean the Chief of Detectives, Andy Fenton?

Q. That's right. A. Yes, sir.

Q. And did you know he was after you, too?

Mr. Taylor: We object to the question, your Honor.

Mr. Bennett: Well, he was like he was after a little money.

Mr. Taylor: Just a moment, Mr. Bennett—going

(Testimony of James J. Bennett.)

to object to the question, prejudicial, not based on any evidence elicited on direct examination or cross-examination.

The Court: Objection sustained.

Mr. Taylor: Ask the jury to disregard the answer of the defendant.

The Court: The jury will disregard his statement after the question. [482]

Q. (By Mr. Stevens): How many times did you make trips with Mr. Wright, Mr. Bennett?

A. I only ever made one trip with him.

Q. Did you ever make a trip to Amarillo with him? A. No.

Q. Where is the Mink Club?

A. Out in northwest Amarillo on the Oklahoma City highway.

Q. You met him there, then?

A. Yeah, I was at the club when they came in.

Q. What was the trip you made with him actually as a passenger? A. Lubbock.

Q. When was that?

A. I don't remember what day it was.

Q. Was that before April the 4th, 1953?

A. No; it was after April. I had some business in Lubbock. I knew what he wanted so I just rode along with him. In fact, I drove the car.

Q. You knew what he wanted? A. Yes.

Q. What was it he wanted, Mr. Bennett?

A. He wanted to meet some people to buy some narcotics.

Q. Did you help him out, Mr. Bennett?

(Testimony of James J. Bennett.)

A. I sure did not. [483]

Q. But he kept seeing you, did he not, Mr. Bennett?

A. Yes; he was pretty much of a drunkard himself and the bank had taken everything he had, having some family trouble and he wanted some company more or less, it semed as.

Q. So you provided the company for a drunkard who was a Special Agent for the Bureau of Narcotics?

A. No, I didn't provide the company. He came around anyway, so to get him away and out of town I got in the car with him and went to another town.

Q. Isn't it a fact, Mr. Bennett, that you found out that he was a Special Agent for the Bureau of Narcotics on the 19th of June, 1953?

A. I did not. I knew it the night of April. I knew it before he came and talked to me because I had already been told he was coming to see me.

Mr. Stevens: Your witness, Mr. Taylor.

Redirect Examination

By Mr. Taylor:

Q. Was Mr. Wright a drug addict?

A. Well, yes; I see him pretty messed up two or three times. I think maybe sleeping pills or benzedrine.

Q. Now, when you were arrested by Mr. McRoberts, did he tell you at that time what he was arresting you for when he took you and Fern Bennett and Norma Crosby to jail?

(Testimony of James J. Bennett.)

A. He did not. He just said, "You're under arrest, too. Let's go," so I just grabbed me a shirt and we came on to the jail. Put me in the front seat between him and somebody. I don't know who it was. [484]

Q. Did Mr. McRoberts have a Warrant at that time?

A. He did not. He didn't read me no Warrant at that time. He said, "You're under arrest, too," and he took me on up to the jail, and to the desk where you are booked and making out the property slip, and I had my billfold out of my pocket and they already locked the two girls up, and he said, "I'm going to take you back to the room in a minute."

Q. Was that after he made the telephone call?

A. Yes, sir.

Q. And did he give you your property back?

A. Well, all I had taken was my knife and what change I had out of my pockets and laid down on the table up there, and I had my billfold out, started counting my money so I put it back in for the time being.

Q. And were those gas coupons in your pocket-book?

A. No, sir; they were not. They was on top of a chest of drawers along with an address book, and I think my gun was laying on top of them.

Q. Now, Mr. Stevens asked you a question about some telephone calls that Mr. Kehert made to you. Did Mr. Kehert tell you at the time that he called

(Testimony of James J. Bennett.)

you up after he came to Texas in the early part of June as to where he was calling from?

Mr. Stevens: Just a moment, Mr. Bennett. Mr. Taylor has learned what the hearsay rule is, your Honor. I object to this one. [485]

The Court: Objection sustained.

Q. (By Mr. Taylor): Did you know that he was in Texas when he made the call?

A. I didn't know for sure he was in Texas, no. He said he just gotten off the plane, got a new car and he would be down in a few days, be by to visit me.

Q. So you concluded the fact that he was going to drive down in a car he was in Texas?

A. Yes, sir.

Q. And he arrived in Texas by plane?

A. Yes, sir.

Q. Did you ever try to keep track of any telephone calls that Mr. Kehert might have made after he got to Odessa? A. No, sir.

Q. You never crowded into a telephone booth with him to listen to who he was calling, did you?

A. I never did.

Q. I thought maybe Mr. Stevens thought maybe you were in a telephone booth with him. Now, you say that you had been at the Highway 80 Motel two, three or four times?

A. Yes, I sold the old lady that owned the place her Cadillac and I usually sold her one every year.

Q. And a couple of those times that you went out there you saw Walter Brown who was here?

(Testimony of James J. Bennett.)

A. I don't remember ever seeing Walter Brown at the court. I seen Walter Brown down in the flat. I had a lot of [486] accounts down there and most all of them were delinquent, kept me down there quite a bit.

Q. And then you heard Walter Brown's testimony yesterday that he saw you twice during the time? A. I did.

Q. So it is possible that he could have seen you a few times down there?

A. He could have seen me by there. Some gamblers live out there that I sold both of those boys a car.

Q. And so then, did you ever see—pardon me, I will withdraw that. Where was the Moonlight Bar?

A. Twelve miles north of Odessa on Highway 51.

Q. And is that the bar to which your father brought the Cadillac to you?

A. Yes; it is a bar and whiskey store.

Q. And when had you packed your stuff and put it in the Cadillac?

A. I packed my stuff several days before, for I was supposed to go to Tennessee and North Carolina.

Q. Now, as to that stay in Denver, Mr. Bennett, could it have been possible there was a mistake, bad mistake made by the garageman as to the date?

A. Could possibly have been. I am sure it was on just one night.

(Testimony of James J. Bennett.)

Q. Did you stay at just one place in Denver?

A. Yes. [487]

Q. Now, Mr. Bennett, I hand you registration card for, that is marked Government's Exhibit "C," showed you occupied Room 11, your party occupied Rooms 11 and 15 in the Royal Motel?

A. Yes.

Q. And I believe if you examine that you will find out that the rate was sixteen dollars a day; is that right?

A. Yes.

Q. And what was the total that you paid that shows on the back of that card, Mr. Bennett?

A. Sixteen dollars.

Q. Sixteen dollars?

A. Yes.

Q. So you stayed there over one night?

A. That's right; got there the afternoon and left the next day.

Q. And according to the Government's Exhibit you stayed there one night; is that right?

A. Yes, sir.

Q. You didn't change hotels then while you were there?

A. No, I did not. I always stay there when I am in town.

Q. In Denver?

A. Yes, sir; I stayed there a number of times.

Q. Wouldn't have made a great deal of difference whether you stayed there one day or two days or three days, would it? [488]

A. I can't see where it would, no, sir.

Q. Now, A. B. Clark, you mentioned A. B.

(Testimony of James J. Bennett.)

Clark had told you there was an Indictment against you up here; who is A. B. Clark?

A. Federal Officer in Anchorage.

Q. What kind of a Federal Officer?

A. F. B. I. Federal Bureau of Investigation, all I know. He came out to my house after me.

Q. Now, you say you heard mention made by Miss Casey as to getting work in a dance hall?

A. Yes; she said she was what they call down there a strip dancer, stripper, and that was about our conversation.

Q. And she had, had she had an opportunity to talk with Mr. Kehert about these dance places in Alaska?

A. Well, I assume that she had, yes.

Q. Is that what you concluded is where she got her information about dance halls?

A. As far as I know.

Q. Now, in answer to some questions shouted at you by Mr. Stevens about this man Wright, what was his first occupation that you knew him when you first knew him?

A. Well, he was selling automobiles.

Q. Have his own business?

A. Had a lot; belonged to the First National Bank.

Q. Then what did he start doing?

A. Well, he started trying to get in politics around [489] there and he was kind of the laughing stock of the town and didn't get very far. He had tried to get on the Sheriff's Department a time or

(Testimony of James J. Bennett.)

two and had been turned down, and finally we got a new Chief of Police in there and I think he probably finally out-talked him for a three months' job. I think he was employed three months.

Q. In what capacity?

A. I have the dates on it, but I don't have them with me. He was a city policeman, worked along with the Narcotics. This new Chief, there was a petition to throw him out and I think they finally got together and resulted in him staying there. They had an election to vote him out twice.

Q. You heard Mr. Wright testify that he is connected with the Texas Bankers; do you know what that outfit is?

A. Yes; it is a little side street loan office.

Q. Oh, it is not as big as the name then; is that right?

A. No, sir.

Q. Now, in relation to when you crossed the border at, from Washington into Canada, you remember seeing Mr. Burton, the Immigration man, there?

A. Yes, sir.

Q. The little fellow that testified up here?

A. Yes.

Q. Did he talk to you at all?

A. No, sir.

Q. Who did he talk to? [490]

A. He didn't talk to anybody. He was driving down the road after we checked through the Customs and we went around him.

Q. So then before you checked in there Mr. Burton was on his way home; is that right?

(Testimony of James J. Bennett.)

A. Yes; Mr. Burton wasn't there when I checked through the Customs.

Q. Which car got there first?

A. We all got there together. I told him the Cadillac and the Mercury was mine, not the man who was on the stand here, was a tall fellow, probably around five eleven, or six one because he counted my money, asked me if I had sufficient money and I told him I did, so he asked me to show it and I counted the money out and presented the papers to my automobile along with insurance and a bond for the car and told him the other car belonged to me, was in my wife's name and he said, take it over to the lady there, and I gave it to my wife, and she gave it to a lady Customs or Immigration Agent.

Q. Did you see some lady checking any of the cars at that particular place?

A. Well, the lady was placed behind the desk. They just took the papers in. I had the papers and the invoice on it. At that time I didn't have a title to that car for it was almost new and I had an invoice on it, and the registration certificate.

Q. Did you have permission to bring it into the Territory of Alaska? [491]

A. I had written permission.

Q. To specifically bring it into Alaska?

A. Yes.

Q. So then some time before you came up here you intended to come to Alaska?

(Testimony of James J. Bennett.)

A. Yes; I intended to come to Alaska for the summer.

Q. Do you remember how long before you left Texas did you get this permission from the finance company to bring the car to Alaska?

A. I got that by telegram first, and then had to have the notarized statement. I didn't have any trouble getting this, but I had trouble getting out.

Q. How long was that before you left Odessa for Alaska that you did actually get your permission to take the car out of Texas?

A. Probably a month or more. When I bought the car I bought it with that understanding.

Q. You had intended then a month before to come back to Fairbanks?

A. Oh, yes; I had quite a bit of money in that Cadillac and the only way I could get out was to sell it up here.

Q. So you didn't make this trip then to bring Marilyn Casey into the Territory?

A. I did not. I knew nothing about that.

Q. Now, these gas coupons, would you just explain how these courtesy cards work, how they, the procedure to get the credit for gas and oil? [492]

A. Well, in the book that these receipts come out of there are three copies of them, of each.

Q. Do you carry that book?

A. No, I carry a card. It is about a two by three and a half. You present that to the dealer. Some of them have a stamp machine that they slip the card into and push a lever down into and it stamps

(Testimony of James J. Bennett.)

it on the top. You get one receipt, they keep one and one going to Standard Oil Company of Texas at El Paso, and it could be a Standard Oil Company of California, which I have both. It goes to California and they mail you a bill afterwards.

Q. Now, how do they print like on this card, how do they print that on there? Is it a stamp that they have?

A. It is a stamp from my card.

Q. That is a metal card then?

A. Yes, it is; well, you can see the size of the piece of metal from this blueprint here. It is a piece of metal on a piece of plastic fabric.

Q. And then how is the date put on there; is that stamped on with the stamping machine?

A. Yes; there is a date machine, a date number in those machines. The only thing I can think, the man just hadn't set his machine up to the day there.

Q. It is possible that he had not?

A. I just came in there one afternoon and left the next day. [493]

Q. Well, this exhibit, then, Mr. Bennett, does show that the date has been put on with some other machine, does it not, a dating machine?

A. Yes, and it isn't in line with the rest of the stamp there.

Q. And then you would attribute it to the difference in date here, it shows on your registration card at the hotel the 21st and this shows the 20th; it would be impossible for you to have got any gasoline from this man on the 20th day of June?

A. Yes, for I wasn't there. I was only there one

(Testimony of James J. Bennett.)

day. I got in there one afternoon, had my two cars serviced, stayed overnight, left the next day.

Q. You didn't have the man at the garage then make that mistake deliberately then, did you?

A. I did not.

Q. You had no reason to? A. No, not me.

Q. And was that credit card in your name, Mr. Bennett? A. It was in my father's name.

Q. And he arranged that credit for you for gas?

A. Yes; I have used it two or three years.

Q. Still have one? A. Yes, sir; have three.

Q. You use that credit card on the way to Alaska, did you, Mr. Bennett?

A. Yes, sir. [494]

Q. For gas for your car, your wife's car?

A. Yes, and sometimes for Kehert's car. Yeah, because I get four cents a gallon kick-back on it.

Q. You get a reduction by buying it through those cards?

A. Yes, sir; not everybody, but I get it through my daddy which he is in the gasoline business. He get a cut-back on it.

Q. Mr. Kehert reimburse you?

A. Yes; we kept a book of it, everything. Mr. Kehert reimbursed me for gasoline put in his car on my card. I think it was \$118.00 worth put in his car.

Q. That was reimbursed to you by Mr. Kehert?

A. Yes, sir; he paid me.

Q. Now, Mr. Kehert, or Mr. Bennett, calling your attention to Plaintiff's Identification 56, was

(Testimony of James J. Bennett.)

that Complaint read to you in its entirety by Mrs. Nordale?

A. The charges were read to us. I don't know if it is that one or not. I don't remember what they said. It is up in the Commissioner's Court.

Q. And was that shortly after your arrest by Agent Harkabus and Worsham?

A. Yes; it was the next day, or the next. It was right shortly after that. I think it was the following day.

Q. And then on Government's Identification No. 57 you say that Mr. Harkabus started to read the Warrant to you? [495]

A. He just read off my name and what I was charged with, aiding and abetting, something like that.

Q. You understood he said that?

A. Yeah, he said something about transportation of a woman for immoral purposes, something like that. I asked him what it means and that is what he said.

Q. Well, then, you said, "Let's go"; is that right?

A. I said, "Let's go," but those Warrants were folded up, not like that.

Q. They were folded up?

A. He folded them something like that where he had them in his hand. That is one reason I didn't recognize these Warrants.

Q. Well, after you got to Fairbanks, Mr. Ben-

(Testimony of James J. Bennett.)

nett, what was the next time that you saw Miss Casey after you arrived?

A. Well, I think we all ate up here, I think it is 13th Street, I know it now, one of them little old lunch counters there and I went to see some people about getting my car on the cab stand and come to find out they wasn't using any lease cars. That is about the last time I seen Miss Casey, seen her going through a bar or something, but I never had any conversation with her.

Q. Did you know what she was doing?

A. No, I didn't. Miss Casey and I never got along too well. I just didn't know her and didn't talk to her too much.

Q. So you didn't bring her up here for any purpose of prostitution? [496]

A. No, I did not.

Mr. Taylor: That's all.

Recross-Examination

By Mr. Stevens:

Q. Mr. Bennett, after you left here, were you arrested in Anchorage for the same thing, for the same charge?

Mr. Taylor: We object, your Honor, upon the grounds it is improper question as to an arrest. I think as far as a conviction, I think he can ask him as to a conviction, but no arrest.

Mr. Stevens: Your Honor, I think the question is valid to show whether or not there was a common scheme on the part of these defendants to transport

(Testimony of James J. Bennett.)

women for the purpose of prostitution. I asked him whether or not he was arrested for the same charge in Anchorage after he left here.

Mr. Taylor: Your Honor, I am going to object.

The Court: I will sustain the objection.

Mr. Stevens: May we have the recess, your Honor?

The Court: Yes. In a moment the court will adjourn until 1:30, but the jury will be excused until 2:00 o'clock. Report back at 2:00 o'clock. In the meantime, remember not to talk about the case or the parties, or to permit anyone to talk about them within your hearing. Keep your minds perfectly free from an opinion as to the guilt or innocence of these defendants until the case is finally submitted to you.

The Clerk: Court is recessed until 1:30. [497]

(Thereupon, at 12:00 noon a recess was taken until 1:30 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Call the roll of the jury, Mr. Clerk.

(Whereupon the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

(Testimony of James J. Bennett.)

Mr. Taylor: Defendant is ready, your Honor.

Mr. Stevens: Prosecution is ready, your Honor.

The Court: Very well, proceed.

JAMES J. BENNETT

the witness on the stand at the time the recess was taken, resumed the stand for further

Recross-Examination

By Mr. Stevens:

Q. Mr. Bennett, this is Government's Exhibit "Q." I believe it is picture; have you seen that picture before? A. Yes.

Q. Was that a picture taken of you and your party at the Mink Club?

A. It was taken at the Mink Club.

Q. It is a true picture? A. Yes. [498]

The Clerk: Government's Identification No. 58.

(Photograph of James J. Bennett and Carol Ward was marked Government's Identification No. 58.)

Q. (By Mr. Stevens): This is Government's Identification 58, Mr. Bennett; was that taken at the same time? A. Same night.

Q. Is that one of the series of pictures that was taken of you and your party that night?

A. It is a picture taken of me and Carol.

Q. And you remember when it was taken; do you remember having your picture taken there?

A. Certainly.

Q. And that is a picture of you and Carol?

A. Yes.

(Testimony of James J. Bennett.)

Q. Now, Mr. Bennett, did you tell Artie Reynolds in Denver that you were in the oil business?

A. That I was in the gasoline business.

Q. You were in the gasoline business?

A. I had an interest in the station, yes.

Q. You didn't tell him you were in the oil business?

A. No, I did not.

Q. You said you were in the automobile business, too?

A. I have been buying and selling cars for a number of years. [499]

Q. Did you have a license to buy and sell cars?

A. At that time I was working with another man's license.

Q. Isn't it a fact that in Texas you have to have a license to buy and sell cars?

A. It is not. If you are maintaining a lot you do.

Q. Well, would you consider yourself as having been a dealer in Texas?

A. No; I was working for a dealer that had a license.

Q. And who was that person?

A. Ernest Phillips for one, Captain Phillips for another one. Both of them are corporations.

Q. And these cars that you bought, did you buy them for the corporation?

A. I bought them for people I knew that would buy them retail in return.

Q. Well, then, Mr. Bennett, why is it that you made such a point about the fact that when you got

(Testimony of James J. Bennett.)

up here to Fairbanks you tried to get your personal cars that you say you bought, the Mercury and the Cadillac, turned into taxicabs?

A. I didn't try to get the Mercury taxicab.

Q. Didn't you testify here this morning that they were not leasing cabs here?

A. I testified as to my Cadillac and I talked to a man about putting on my Cadillac. He told me they weren't putting on any leased cars. [500]

Q. Isn't it a fact that that Mercury is now being used as a taxicab in South Fairbanks?

A. No, it is not. It doesn't have a "for hire" tag on it if it is.

Q. Mr. Bramlett does run a taxi business in the south end?

A. I understand he is driving a Chrysler, yes, sir.

Q. Now, you say that you saw Mr. Burton, the Canadian Immigration Inspector, just driving down the road; you never talked to him?

A. No, I didn't talk to him.

Q. All you saw him was when you passed him?

A. I saw him two or three times.

Q. But that was just when you passed him in the car, was it not?

A. There was a car way down ahead of us when we pulled into the Customs. In fact, about the time we drove in he pulled out, drove along slow and we overtook him.

Q. You saw the man that was driving the car at the Customs station?

(Testimony of James J. Bennett.)

A. When I drove in the Customs station, he was driving out.

Q. You did not know who was in the car then?

A. No, I didn't know who it was.

Q. Then the only time you saw him was when he passed you on the road? [501]

A. No; when he went into his front gate, walked through the gate and turned around and looked at us as we passed.

Q. That is what he testified here, too, is it not?

A. I don't know.

Q. But the only time you saw him was as you drove past him; you didn't ever stop and talk to him?

A. No.

Q. But you remember exactly who he is?

A. I remember him passing me; as far as identifying him, no, I don't remember him. I know he isn't the man that checked me in at the Customs.

Q. You know he is the man you passed on the road?

A. His haircut and head looks like it.

Q. But you don't remember seeing him at the Immigration Station?

A. No.

Q. Mr. Burton's testimony then concerning his conversation with you is not true?

A. It is not. He had no conversation with me. I think if you will check those tickets you will find out who checked me in there.

Q. Are you under the impression, Mr. Bennett, that Mr. Burton came all the way up here to tell something he did not know?

A. I am under the impression that Mr. Burton

(Testimony of James J. Bennett.)

is like two or three more of the witnesses, that he was more or less told what to say. [502]

Q. A member of the Department of Justice, too, Mr. Bennett?

A. I don't know what he does. He was in a car when I seen him first, and standing in his yard the last time.

Q. And Mr. Reynolds, you are under the impression that he did not tell the truth also; is that correct? A. Who is Reynolds?

Q. He is the gas station operator from Denver.

A. I think Mr. Reynolds' statement was true more or less, all with the exception of the date on those tickets.

Q. And also to the fact that you drove up in the Mercury and not in the Cadillac?

A. I drove the Cadillac myself.

Q. He stated that a lady drove up in the Cadillac? A. He could have been mistaken.

Q. And Mr. Brown was also mistaken that he had a conversation with you?

A. Yes; Mr. Brown sure was.

Q. And Mr. Wright was mistaken when he testified that he had a conversation with all of you, all four of you concerning your trip to Alaska?

A. Yes; he sure was. Mr. Wright is mistaken about a lot of things.

Mr. Stevens: Your Honor, we offer this Government's Identification 58 in evidence also. It is a companion picture.

Mr. Taylor: We object, your Honor. It goes

(Testimony of James J. Bennett.)

to [503] prove none of the issues of the Complaint. A picture taken—there is another picture the same might put into evidence here. We don't see where it could be competent, relevant or material.

The Court: Objection overruled. It may be admitted.

The Clerk: Government's Exhibit "U."

(Government's Identification No. 58 was received in evidence as Government's Exhibit "U.")

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: That's all, Mr. Bennett.

(Witness excused.)

Mr. Taylor: Call Mr. Kehert.

WESLEY KEHERT

one of the defendants, was duly sworn as a witness in his own behalf, and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Wesley Kehert.

Q. Where do you reside, Mr. Kehert?

A. Anchorage.

Q. How long have you resided at Anchorage?

A. On and off for about eight years.

Q. And how long have you been a resident of Alaska?

A. On and off eight years.

(Testimony of Wesley Kehert.)

Q. And what is your occupation, Mr. [504] Kehert?

A. Well, I have worked as a waiter, electrician, carpenter, and I had a cab company and drove cab.

Q. Are you in business in Anchorage at the present time? A. No, I am not.

Q. Did you ever work for the government?

A. Yes, I did.

Q. What doing? A. Electrician.

Q. Were you in the service, Mr. Kehert?

A. Yes, I was.

Q. What outfit were you in?

A. Marine Corps.

Q. And where did you serve?

A. In the Pacific.

Q. And in what particular places?

A. Guadalcanal, Bougainville, Emiru and Guam.

Q. And when were you discharged from the Marine Corps? A. November 5, 1945.

Q. What was the reason for your discharge?

A. I got—I was wounded while I was overseas.

Q. And do you now receive any pension or disability pay? A. I receive \$60.00 a month.

Q. Is that permanent disability?

A. Yes, it is.

Q. For wounds received in action? [505]

A. Yes, it is.

Q. Now, Mr. Kehert, were you in Anchorage during the early part of the year of 1953?

A. Yes.

Q. Particularly the month of May?

(Testimony of Wesley Kehert.)

A. Yes.

Q. How much of that month were you there?

A. I was there the whole month of May.

Q. And after the expiration of the month of May, 1953?

A. I took Northwest Airlines and flew to Chicago about June. Around from the 2nd to the 3rd, something like that, 4th, it was around in there.

Q. Where did you go from there?

A. I went from there down to Indiana to see my mother for a few days. From there I left and went to Texas.

Q. And about what time did you go to Texas?

A. I must have went to Texas around the 10th of June, and I went to Lubbock, Texas, first. I was there about, a few days; from there I called Bennett up and went over to Bennett's.

Q. Now, during the early part of May, 1953, where was you working?

A. I was working at the Bell and Whistle taxi dance in Anchorage, waiting tables.

Q. And how long that month did you work there?

A. I worked on up until about, oh, I imagine, around the 20th of that month, I believe. [506]

Q. You worked all the month except after the 20th? A. No, I came to Fairbanks.

Q. What date did you come to Fairbanks?

A. I was in Fairbanks around the 23rd, 24th of May.

(Testimony of Wesley Kehert.)

Mr. Taylor: I would like to have these marked for identification.

The Clerk: Defendant's Identifications A and B.

(Check made payable to Wesley Kehert, dated 5/16/53, signed by Starres, was marked Defendant's Identification A.)

(Check made payable to Wesley Kehert, signed by Starres, was marked Defendant's Identification B.)

Q. (By Mr. Taylor): And how long did you remain in Fairbanks?

A. I remained in Fairbanks for about two days. I went back to Anchorage.

Mr. Stevens: I would like to look at those, Mr. Taylor.

Q. (By Mr. Taylor): You say you were here about two or three days, then went back to Anchorage?

A. That's right.

Q. And who were you with in Fairbanks?

A. I was with Ace Burney, the fellow that was up here yesterday. [507]

Q. Now, I hand you Plaintiff's, or Defendant's Identification A, and ask you to look at that check and state if you can what it is?

A. This is a check for a week's work at Bell and Whistle Club made out by Starres, Larry Starres.

Q. Who is it payable to?

A. To Wesley Kehert.

Q. What is the date of issue?

A. May 16, 1953.

(Testimony of Wesley Kehert.)

Q. And what is the date of the cashing of that?

A. I——

Q. I think if you hold the perforations up to the light.

Mr. Stevens: I object to that, your Honor. That is not any evidence of when the check was cashed. It is evidence of when the check went through the bank.

The Court: Objection overruled.

A. I can't figure out this.

Q. (By Mr. Taylor): Is that a check you got then for, pay for the week ending—did you cash this yourself at the bank, Mr. Kehert?

A. Either there or at the Bell and Whistle, one or either at one of Starres' other places. That is the only place it might have went through, at Bell and Whistle or it might have went through one of his other places.

Q. I ask you to take a look at the endorsements on the back and ask if you can state when that was cashed, or who cashed it? [508]

A. Well, this was probably cashed over at Starres. It has got Larry's, Inc. I imagine the bookkeeper ran it through.

Q. And that was on the 18th day of May?

A. 16th day of May.

Q. That is the date it was issued, and see what date it was run through the bank there, Mr. Kehert?

A. It was ran through the, May 18, '53.

(Testimony of Wesley Kehert.)

Mr. Taylor: If the court please, we would like to have these introduced in evidence.

Mr. Stevens I would like the right to cross-examine this witness on those.

The Court: Very well.

Q. (By Mr. Taylor): After you got that check on the 16th of May was you still employed there?

A. I think I worked a few more days after that and came to Fairbanks. I believe that was the way it was.

Q. Then you were in Alaska all of the month of May, 1953, Mr. Kehert. A. Yes, I was.

Q. And what was the date you say you arrived in Texas?

A. Well, roughly I would figure around the 10th of June. Now, I figure that now, now I could be a little off, a few days, but it is roughly there pretty close.

Q. And where did you go in Texas?

A. I first went to Lubbock, Texas.

Q. And then where did you—how long did you stay there? [509]

A. I stayed in a motel down there for about four days, I believe it was.

Q. And where did you go from there?

A. From there I went to Odessa, Texas.

Q. Did you see Mr. Bennett at Odessa?

A. Yes, I did.

Q. And how long did you remain at Odessa?

A. Oh, for a couple days, and then we went to Galveston.

(Testimony of Wesley Kehert.)

Q. And you have any particular purpose in going to Galveston?

A. I wanted to see this girl in Galveston.

Q. Which one was that?

A. Marilyn Casey.

Q. You had know her before?

A. Yes, I did.

Q. And how long did you stay there?

A. In Galveston?

Q. Yeah.

A. I was there about, either two or three days, might have been two days.

Q. What conversation, if any, did you have with Marilyn Casey regarding coming to Alaska?

A. Go to work at the Squadron Club or the Bell and Whistle Club in Anchorage. She was wanting to come.

Q. Who brought up the subject of coming to Alaska? A. She did. [510]

Q. Had you told her that you were coming back to Alaska?

A. I told her I didn't care too much about coming right then, but I was going to come and she said she would like to go and all of that.

Q. Did Mr. Bennett participate in that discussion of her coming up? A. He did not.

Q. And how long—did Miss Casey accompany you then back to Odessa? A. That's right.

Q. And how long were you at Odessa before you left for Alaska?

(Testimony of Wesley Kehert.)

A. We got in that evening and left that morning.

Q. About what time?

A. Oh, it was early. I imagine around four o'clock or so, five o'clock, around there somewhere. I'm not for sure about the time.

Q. Warm weather at that time?

A. Yes, it was. It was getting pretty nice.

Q. You drove from there to Denver?

A. Yes, arrived in Denver on Sunday evening.

Q. And how long did you stay in Denver?

A. Until I went to Western Union the next morning and picked my money up.

Q. You got in there on Sunday and went to Western Union on Monday morning?

A. That's right. [511]

Q. And you cashed that money order for \$992.00?

A. Correct.

Q. And then you proceeded to come north along, you say the testimony of Mr. Bennett is practically identical with the testimony you would give in this case?

A. I would say so.

Q. Now, at any time did you ever have any talk with Marilyn Casey regarding her entering into the practice of prostitution in Alaska?

A. We did not.

Q. Or any other place?

A. We did not.

Q. And after you got to Fairbanks, what, if anything, did Miss Casey ask you to do?

A. When we got to Fairbanks?

Q. Yes.

A. What did she ask me to do?

(Testimony of Wesley Kehert.)

Q. Regarding lodging?

A. Oh, we was having some misunderstanding and all and I got her this room down at Murphy's.

Q. Was that at her request?

A. Yes, it was, and mine also. We both agreed on it.

Q. And did you then have any association with Marilyn Jean Casey after that?

A. No, I did not. I mean we wasn't on the outs or anything like that. I mean just an understanding. [512]

Q. That your relationship was off; is that right?

A. That's right.

Q. Did you know that she had entered into the practice of prostitution? A. No, I did not.

Q. And then what, were you arrested shortly after that? A. That's right.

Q. And where were you arrested?

A. Transient Rooms.

Q. And who arrested you?

A. Harkabus, Worsham and McRoberts.

Q. And what time of the day was it that you were arrested?

A. That was in the evening, about seven o'clock I imagine, something like that.

Q. And did all of those men come to the door?

A. Yes, they did.

Q. What did they do?

A. There was a knock on the door, and I said, "Come in." No one came so I got up and opened the door and I was pushed back on the bed. Mr.

(Testimony of Wesley Kehert.)

Harkabus jumped up on top me with his pistol on my head and hollered, "Where is it; where is it?" And I finally managed to say, "Where is what?" He said he wanted my gun and I told him I didn't have one. He tied me down to my waist. I was shoved in the hallway, asked to put my hands up on the wall, which I could not do. Mr. Worsham politely booted me one and McRoberts came up and said, [513] "Wait a minute. He cannot put his hands up. He is taped to his waist." I was tied with my belt buckle. So McRoberts untied me. I put my hands up. They shook me down and put me back on the bed. Then they proceeded to shake my room down. I guess they was looking for a pistol. That is what they said, so they came across the camera and wanted to know whose the camera was. I said it was mine. They was not in the sack. My hat was in that sack that they got here. They took the hat out of the sack. They took the sack. Camera was in a drawer, said whose camera, I said mine. They took that. Films was in another drawer. They said, have these been taken. I said I didn't know if they was or not, so they took the film which later on found out the film was taken. I think there was one roll which wasn't taken.

Q. They was taken in more than one way?

A. Yes, and then I had some more pictures there of my mother, people and they proceeded to take them back.

Q. Did you get them back?

A. Never. I went up and asked for them.

(Testimony of Wesley Kehert.)

Q. Did you get a receipt for them?

A. Absolutely no. They wouldn't give me one.

Q. Who did you ask for a receipt?

A. Mr. Worsham for one.

Q. Did you ever ask McRoberts?

A. No, I did not. He told me he would see they were returned to me when this was over. [514]

Q. Where was you taken after they got through searching the room?

A. I was taken to Mr. Gore's office. I was then shown my warrant. They told me I had a right then to call an attorney and anything I would say then would be used against me. And then they asked me if I had anything to say and I said no, and that is when I was booked. That was all of it.

Q. Were you present at the preliminary hearing of this case? A. Which one?

Q. The first one before Mrs. Nordale?

A. Where we was found not guilty?

Q. Well, the time you were released?

A. Yes, I was.

Q. And at that time was not a demand made by your attorney for the return of the articles that had been taken from your possession?

A. Yes, they were.

Q. And were they returned?

A. They were not.

Q. And were those same articles then used before the grand jury for the returning the indictment for which you are being tried now?

A. That is what I was told.

(Testimony of Wesley Kehert.)

Q. Now, Mr. Kehert, at any time while you were on the trip from Texas to Fairbanks or any time prior to that or after [515] you got here, did you have any conversation or any understanding with Marilyn Casey that she was to practice prostitution in Fairbanks or other places in Alaska?

A. I did not.

Q. Have you ever been convicted of a crime, Mr. Kehert?

A. Yes, I have been.

Q. Where?

A. In Anchorage.

Q. What was the nature of the crime?

A. Failing to stop at the scene of an accident.

Q. Did you stop?

A. I stopped and went around the block and came back to the scene.

Q. And what was the outcome of that case?

A. I was fined three hundred dollars, three months suspended sentence, and I made a five hundred dollar settlement, paid the hospital bill of the person that was involved.

Q. After you hit him, you did run around the block and came back to where he was?

A. That is right exactly, but they seen fit to say that if you moved at all it was leaving the scene so I was found guilty. That was in Commissioner's Court.

Q. Any other convictions?

A. No, sir.

Q. Now, Mr. Kehert, you heard the testimony of a man by the name of Mr. Wright?

A. I heard it. [516]

Q. And he stated under oath that he was present at Mr. Bennett's house on the 18th day of May,

(Testimony of Wesley Kehert.)

1953? A. That's correct.

Q. And that you drove up in a laundry truck?

A. That's right.

Q. Was that statement by Mr. Wright true?

A. It was false and there is a hundred people in Anchorage that can prove it, and these checks.

Q. On that date you were in Anchorage?

A. Absolutely.

Q. So Mr. Wright then was deliberately perjuring himself then on this stand; is that right?

A. He most certainly was.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Stevens:

Q. You have lived off and on in Anchorage for eight years, Mr. Kehert? A. Yes, sir.

Q. Have you been to Galveston before?

A. Yes, sir.

Q. During that eight years? A. Yes, sir.

Q. How many times? A. One time.

Q. When was that? A. In '53. [517]

Q. What time in '53?

A. Well, it was around February, March.

Q. Of 1953? A. Yes, sir.

Q. How did you go down?

A. I flew down.

Q. Isn't it a fact, Mr. Kehert, that you flew down to Texas in May, the latter part of May, 1953? A. No, it is not true.

(Testimony of Wesley Kehert.)

Q. Are you sure you were not in Anchorage June of 1953, June 3rd, 4th, 5th and 6th?

A. I left around the 3rd, I believe it was, around the 3rd I left.

Q. Where do you live now?

A. Anchorage.

Q. Where? A. 1335 East "I" Place.

Q. When was it that you lived at the North Star Motel with Mr. Burney?

A. That was in May.

Q. In May? A. Yes, sir.

Q. Latter part of May? A. Yes, sir.

Q. Was that while you were working for the Bell and Whistle?

A. I believe it was after I left the Bell and Whistle. [518]

Q. How long have you known Ace Burney?

A. Oh, for a few years slightly, you know, until we lived together is when I really knew him.

Q. Were you engaged to Miss Casey?

A. As a manner of speaking, yes.

Q. Well, by engaged do you mean what most people mean, that you were going to marry Miss Casey? A. That was the general idea.

Q. When were you to get married?

A. Whenever we seen fit.

Q. And did Miss Casey know where you were during the last year or so?

A. No, I don't believe so.

Q. Did she know where you were until June of 1953? A. Yes.

(Testimony of Wesley Kehert.)

Q. When did you inform her?

A. What was it?

Q. When did you inform her of your whereabouts?
A. When I seen her in June.

Q. In June?
A. Yes, sir.

Q. And you decided then you would marry her?

A. Well, we talked about it before.

Q. And she knew you had been in Alaska?

A. I don't know if I told her that or not.

Q. Didn't discuss going to Alaska with [519]
her?
A. The first time?

Q. You said you didn't discuss, you told Mr. Taylor you did not discuss going to Alaska with her?

A. Which time are you speaking of?

Q. In June of 1953.

A. Oh, we discussed it. She and I did, on the way to Odessa from Galveston.

Q. She just packed up from Galveston and went on with you to Odessa without knowing where she was going?

A. Oh, we talked about going to Alaska, and I didn't care to go then, but she said she would like to go.

Q. Your hat was in that sack that is in evidence?

A. My hat was in my sack.

Q. Is that your sack?

A. No, it wasn't my sack, no.

Q. Do you know what the store is?

A. I believe a pair of pedal pushers came in there, I believe.

(Testimony of Wesley Kehert.)

Q. Miss Casey bought them at the Fashion Bar in Denver? A. I believe so, yes, sir.

Q. Mr. Kehert, are you sure of when you left Anchorage in June of 1953?

A. Yes, sir.

Q. And it was sometime around the 3rd?

A. Sometime around there. It might have been a few days forward. [520]

Q. Which way?

A. Well, it could be the 4th, 3rd or the 4th. It is right in that neighborhood.

Q. Wasn't it a fact you flew down to Texas, then came to Fairbanks, then to Anchorage and then back to Texas?

A. No, I went back to Chicago, and Jeffersonville, Ind.

Q. Oh, you went to Jeffersonville, Indiana?

A. I bought an automobile in Chicago and then went to Jeffersonville, Indiana.

Q. And then went down to Lubbock?

A. Went to Lubbock.

Q. Who did you go to see?

A. Just took a trip down there.

Q. Had no friends in Lubbock? A. No.

Q. Mr. Garcia down there?

A. No, he lived outside of Lubbock.

Q. You know him?

A. Oh, yes, I do know him.

Q. You were pretty much booted around by the FBI, were you?

(Testimony of Wesley Kehert.)

A. I wouldn't say so, no.

Q. I believe you said Mr. Worsham booted you one?

A. He took his foot and shoved me up against the wall and said, "Put them hands up."

Q. How did he kick you? [521]

A. He took his foot and politely shoved me up against the wall.

Q. What did he have in his hands?

Q. He had nothing in his hands.

Q. He put his foot to you?

A. That's right. He couldn't understand why I couldn't put my hands up.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: That's all, Mr. Kehert.

(Witness excused.)

Mr. Taylor: I would like to call Mr. Stevens, your Honor.

Mr. Stevens: I am not hesitant about taking the stand as long as Mr. Taylor doesn't want to invoke this rule that says I can't come back to my job as a prosecutor.

Mr. Taylor: I am not using that as a subterfuge to get rid of Mr. Stevens, your Honor. I just want to ask him a few questions.

THEODORE F. STEVENS

a witness called in behalf of the defendants, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Mr. Stevens, I believe you are the United States Attorney for the Fourth Division, Territory of Alaska? A. I am. [522]

Q. And you were such United States Attorney or acting United States Attorney at the time of the arraignment on the first arrest of Mr. Kehert and Mr. Bennett and these two girls?

A. No, I was not.

Q. Who was the United States Attorney at that time?

A. At the time of the first arrest, I do not know. I took office on the 1st day of September, 1953.

Q. Well, were you the United States Attorney that conducted the hearing before Mrs. Nordale, I believe along the 20th day of October, 1953?

A. I conducted the first preliminary hearing on the 6th day of October, 1953, before Mrs. Nordale in connection with this case.

Q. Was that the time the case was dismissed?

A. That was not the time the case was dismissed.

Q. When was the case dismissed?

A. The case was continued on the 6th day of October until the 20th day of October, because Miss Casey was feigning sickness. We reconvened the preliminary hearing on the 20th of October at your

(Testimony of Theodore F. Stevens.)

request and at that time Miss Casey refused to testify for the government and I dismissed the case. The case was never dismissed from the preliminary hearing because of lack of evidence.

Q. Isn't it a fact, Mr. Stevens, that Miss Casey told the same story at the preliminary hearing before Mrs. Nordale on the 20th day of October that she told here? [523]

A. It is not a fact. Miss Casey has now told five stories to my knowledge.

Q. And she did state that the statement that has been put in evidence here, the two statements were false?

A. She did not. She was presented with one statement, Mr. Taylor, the Affidavit of Facts taken before Mrs. Nordale on the 8th day of July, 1953, and Miss Casey stated under oath in answer to my question that every word of the statement was a lie. Every word, Mr. Taylor, not the whole statement, every word.

Q. And thereupon you dismissed, you asked Mrs. Nordale to dismiss the case?

A. Thereupon I did and informed Mrs. Nordale that I was taking the case directly to grand jury.

Q. And then at that time, Mr. Stevens, do you recollect my making a motion to Mrs. Nordale for the release of the exhibits that had been introduced?

A. I do, Mr. Taylor, and I refused to grant that.

Q. Was it not within the province of Mrs. Nordale to grant the release of those exhibits?

A. Those exhibits were never admitted in evi-

Mr. Stevens: We call Mr. Nichols, your Honor, if you please. [526]

CLIFTON C. NICHOLS

a witness called on behalf of the plaintiff in rebuttal,
was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. Clifton C. Nichols.

Q. Where do you live, Mr. Nichols?

A. In Anchorage, Alaska.

Q. What is your business in Anchorage, Alaska,
sir? A. Owner and operator of a motel.

Q. What is that motel?

A. The North Star, North Star Motel.

Q. And where is the motel located?

A. Fifteenth and Gamble in Anchorage.

Q. And how long have you run that motel, sir.

A. We opened the 8th of last May.

Q. You opened on the 8th of last May?

A. That's right

Q. And have you been the owner of that motel
since then? A. Yes, sir.

Q. Who operates it with you?

A. My wife.

Q. And as the normal course of business, do you
keep records of the guests who stay in your motel?

A. Yes, we do. [527]

Q. And do you keep a record of all the guests
that stay in your motel? A. That's right.

(Testimony of Clifton C. Nichols.)

Q. How did you keep the record, say during the month of May?

A. Well, we had a hotel register book that everyone registered in.

The Clerk: Government's Identification No. 59. Government's Identification No. 60, and Government's Identification No. 61.

(Register of North Star Motel, Anchorage, Alaska, was marked Government's Identification No. 59; Registration card of North Star Motel showing name of Steve Williams was marked Government's Identification No. 60; Registration card of North Star Motel showing names of Kehert and Burney was marked Government's Identification No. 61.)

Q. (By Mr. Stevens): Now, Mr. Nichols, this is Government's Identification 59; would you identify that for us, please?

A. Yes, this is our hotel register for that, we opened up, used when we first opened up. We had some register cards coming but they didn't get there in time, so we used this hotel register until the cards came.

Q. And did you register your guests or did you have your guests register in that book? [528]

A. We had every guest register in that book until we got the cards.

Q. Have you examined that book to determine who was registered there during the month of May

(Testimony of Clifton C. Nichols.)

before you came to this court? A. Yes.

Q. Have you examined that book to determine whether or not Wesley Kehert and Ace Burney were registered there during the last two weeks of May?

A. Well, they weren't registered as A. Burney and Steve Kehert on the 2nd of June.

Q. And how long——

A. There is no register in May of that name.

Q. And how long did Mr. Burney and Mr. Kehert stay at your motel in June, according to your records?

A. Well, they were there on the 2nd and 3rd and 4th, and then evidently checked out and checked back in on the 5th and were there two more days, 5th and 6th of June.

Q. This is Government's Identification 61, Mr. Nichols; will you tell us what that is, please?

A. Well, this is the card. We got the card on the 5th of June and we made up cards. This card here made up from the books. That is the name has been transferred from the book and the record of the two days, the 5th and 6th is on this card.

Q. Is that a record you kept in the normal course of business in operating your motel?

A. Yes. [529]

Q. And was it the normal course of business for you to keep such records? A. Yes, it was.

Q. I hand you Government's Identification 60; will you tell us what that is, please?

A. Well, it is register under the name of Steve Williams on July the 26th.

(Testimony of Clifton C. Nichols.)

Q. And is that a record which you kept in the normal course of business? A. That's right.

Q. Are you required by law to keep these records, Mr. Nichols?

A. I think so. I never did look up the law on it.

Q. But you do keep them as a normal course?

A. We do keep the records.

Q. And everyone that checks into your place, do you have a record of them? A. That's right.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Mr. Nichols, are you personally acquainted with Mr. Kehert?

A. No, not personally. I wouldn't know him. I have seen his face, but I wouldn't know him by name if I was to see him. [530]

Q. Do you remember him as being a guest at your establishment? A. I think so.

Q. And you remember Mr. Burney, a cook that was living there with Mr. Kehert?

A. You say he was a cook?

Q. I believe he was driving taxi at that time, taxi driver?

A. I remember something about it, and that's about all. It is remote in my mind. I can't put all these faces and names together exactly.

Q. Quite a few people pass through your motel, I suppose? A. That's right.

(Testimony of Clifton C. Nichols.)

Mr. Taylor: That's all, Mr. Nichols.

Mr. Stevens: Your Honor, we offer into evidence Government's Identifications 59, 60 and 61 as business records kept by the North Star Motel, and the offer is made pursuant to the business records statute.

Mr. Taylor: I would like to see Identifications 60 and 61, please.

Q. (By Mr. Taylor): Mr. Nichols, I see the name here is Steve Kent, did you have a——

A. Oh, which one, which card is it on?

Q. That is on the one dated June the 5th, 1953?

A. That could be an error. I think my wife when she [531] transferred that from the books. We got the cards and we made up cards for all the persons that were there at that time. She may have misspelled it.

Q. Is the name spelled right on the registration book?

A. I think so.

Q. And that was the last registration that came in there then, on June the 5th; is that right?

A. Well, that is the last one under that name, yes.

Q. Well, isn't it the last one that you have in the book?

A. I think so, yeah, that is the last registration in the book.

Q. And when was that registration made?

A. June the 5th.

Q. Wasn't made since you were ordered to come up here to testify, was it?

A. Oh, no.

(Testimony of Clifton C. Nichols.)

Q. It is just a coincidence then that it happened to be the last item in the book?

A. Yes, we got the cards and a card rack that those cards fit in, and we put them on the cards.

Q. And these were copied from the books?

A. The one card was and the other card is a definite signature, Steve Williams.

Q. And that was dated July the 26th, 1953, was it?

A. Whatever it is on the card. Yes, the [532] 26th.

Mr. Taylor: If the court please, we have no objection to the introduction of the book, but as these were copies, the one shows Steve Kehert on June the 5th, 1954, as that is a copy from the book, your Honor, it wouldn't be an original record and we are going to object to it, and the one on July the 26th is too remote, has no bearing on the issues in this case; would be incompetent, irrelevant and immaterial. We object to the admission.

Mr. Stevens: We have no objection for withdrawing the offer for June the 5th. It is a duplicate record. The book speaks for itself. We do offer the other two, the book and the July 26th record.

Mr. Taylor: I can't see where the July 26th record is pertinent at all, your Honor. That is a month after all this stuff happened.

The Court: Say that again, Mr. Taylor.

Mr. Taylor: July the 26th, 1953, your Honor, is quite remote.

The Court: How do you think that is relevant?

(Testimony of Clifton C. Nichols.)

Mr. Stevens: It is a registration by the same person under the name of Steve Williams. Mr. Kehert has been known as Steve Williams by various people involved in this proceeding, Mr. Wright for one, Miss Casey for another.

The Court: Very well then, the offer will be accepted. It may be admitted.

The Clerk: Identification 59, the register, is Government's Exhibit "V"; and Identification No. 60, the [533] guest register, the original that is, Government's Exhibit "W."

(Government's Identification No. 59 was received in evidence as Government's Exhibit "V"; Government's Identification No. 60 was received in evidence as Government's Exhibit "W.")

Redirect Examination

By Mr. Stevens:

Q. Now, Mr. Nichols, this is Government's Exhibit "V." Now, will you take a look there at approximately June 2nd, I believe it is. Did Mr. Kehert register at your hotel on that day?

A. Yes.

Q. And who was he with?

A. He is registered as A. Burney and Steve Kehert.

Q. Now, was Mr. Burney living at your hotel last two weeks of May?

A. No, I don't have any record of him being there at all.

(Testimony of Clifton C. Nichols.)

Q. And how long did they stay there in June?

A. Three days. Five days all together.

Q. They re-registered again?

A. On the 5th.

Q. On the 5th. Then is it your testimony, Mr. Nichols, that Mr. Kehert and Mr. Burney stayed at your motel on the 2nd, 3rd and 4th and re-registered again and stayed on the 5th and 6th?

A. That's right. [534]

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: No further questions. That's all, Mr. Nichols.

(Witness excused.)

Mr. Stevens: May we have the recess, your Honor.

The Court: Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 2:50 p.m., the court took a recess until 3:02 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel stipulate all the members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Stevens: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Stevens: Mr. Trafton, please. Oh, just a moment, I would like to call Mr. Gore. Again I state to the court he has been in the court room part of the time during this hearing, your Honor.

Mr. Taylor: I will waive it.

Mr. Stevens: Do you waive your right entirely?

Mr. Taylor: I waive as to rebuttal testimony only, not direct evidence, your Honor.

The Court: Is that satisfactory?

Mr. Stevens: No. I won't call Mr. Gore, but I ask the court to strike entirely from the record the testimony of Mr. Burney. Mr. Burney was in this court room for a period [535] of almost two hours during the course of this trial.

The Court: Is that true, Mr. Taylor; do you know?

Mr. Taylor: Not that I know of. I never met Mr. Burney, because when I met Mr. Burney I told him not to come to the court room.

Mr. Stevens: I believe he was seen by many witnesses in the court room, your Honor, including the bailiff.

The Court: I would have to have some proof that he was in the court room during that time. Where is Mr. Burney?

Mr. Stevens: Mr. Burney here today, Mr. Taylor?

Mr. Taylor: I do not know. I don't believe I have seen him.

Mr. Stevens: Is Mrs. Williams here? Mrs. Williams, were you a spectator here in the court room yesterday?

Mrs. Williams: Yes, sir. I have been in the court room every day since Monday.

Mr. Stevens: Would you care to take the stand concerning this issue.

Mrs. Williams: All I can say is that he was here.

Mr. Stevens: Will you take the stand for that purpose, please.

EFFIE WILLIAMS

a witness called on behalf of the plaintiff as to the collateral issue, was duly sworn and testified as follows: [536]

Direct Examination

By Mr. Stevens:

Q. State your name, please.

A. Effie Williams.

Q. And have you been a spectator in this court room particularly yesterday? A. Yes, sir.

Q. During the course of this trial?

A. Yes, sir.

Q. Did you observe Mr. Burney take the stand?

A. Yes, sir.

Q. Had you observed him in the court room before he took the stand? A. Yes, sir.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Where was Mr. Burney sitting, Mrs. Williams?

A. Yesterday he came in after we were seated. My husband and I passed down the aisle there and went toward the back.

(Testimony of Effie Williams.)

Q. And where were you sitting?

A. On the front row.

Q. Had you seen Mr. Burney before?

A. Yes, sir.

Q. Do you know Mr. Burney? [537]

A. Not personally, no, sir.

Q. When did you first see Mr. Burney?

A. Monday in the court room.

Q. Monday, and where was he sitting Monday in the court room? A. Toward the back.

Q. That was the time they was drawing the jury then, was it, Mrs. Williams?

A. Yes, sir. I have been here every day since the trial started.

Q. And that was the time you saw him go to the rear of the court room? A. Yes, sir.

(Witness excused.)

Mr. Taylor: We don't believe there is sufficient showing, your Honor. There is a lot of them here when they was drawing the jury.

The Court: Well, there was no objection made to him when he presented himself, and as a matter of fact, his evidence is apparently not influenced by what he heard here in this court.

Mr. Stevens: Very well, your Honor.

The Court: I will deny the motion.

WILLIAM TRAFTON

a witness called on behalf of the plaintiff in rebuttal,
was duly sworn and testified as follows: [538]

Direct Examination

By Mr. Stevens:

Q. Will you state your name, please?

A. William Trafton.

Q. And where do you reside, Mr. Trafton?

A. Fairbanks.

Q. And what is your business here in Fairbanks,
Alaska?

A. I am employed by the Department of Terri-
torial police.

Q. Were you so employed in June of 1953, and
July of 1953? A. Yes.

Q. Calling your attention to the first week of
July of 1953; did you have occasion to accompany
Mr. McRoberts, the then Acting United States Mar-
shal, in connection with the arrest of two women for
operating a bawdy house? A. Yes, I did.

Q. And do you remember who those women
were?

A. I recall the name of one of them was McAllis-
ter. I don't recall the name of the other one.

Q. Was that Betty McAllister? A. Yes.

Q. And at that time did you see James Ben-
nett? A. Yes, I did.

Q. And where was he?

A. He was in one of the rooms with the [539]
girls.

(Testimony of William Trafton.)

Q. And did you, either you or Mr. McRoberts place Mr. Bennett under arrest at that time?

A. No.

Q. Did he accompany you to the jail?

A. Yes, he did.

Q. And why was that, Mr. Trafton?

A. He said he wanted to go along to get the girls out.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. Did you go down to the jail when Mr. Bennett was being booked?

A. I didn't understand you, sir.

Q. Did you go down to the jail while they were booking Mr. Bennett?

A. I didn't go up to the jail.

Q. You didn't go to the jail? A. No, sir.

Q. You don't know whether they booked him at the jail or not then, Mr. Trafton?

A. I don't know whether they booked him or not.

Q. And where was this bawdy house supposed to be being run by Betty McAllister?

A. It was what they call the Colonial Rooms.

Q. Do you know how long Betty McAllister had been in the Colonial Rooms at the time that you went there? A. No, sir. [540]

Q. Did you know anything about the offense at all?

A. I heard rumors about it is all. That's all.

(Testimony of William Trafton.)

Q. And did you know that there was no prosecution of Betty McAllister after that arrest?

A. Yes, I knew that.

Q. There was no prosecution?

A. As far as I know, there was none.

Mr. Taylor: That's all.

Mr. Stevens: That's all, Mr. Trafton.

Call Mr. Wright.

C. M. WRIGHT

a witness called on behalf of the plaintiff, having been previously sworn, was recalled in rebuttal and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. You have been sworn, have you not, Mr. Wright? A. Yes, sir, I have.

Q. Mr. Wright, when you started undercover work which you testified to previously here, were you a member of the City Police of Odessa?

A. Yes, sir, at that time before we started.

Q. And had you been a member of any other police organization there?

A. I had a Special Deputy's Commission for, since I believe it was March of 1951 up until that time. [541]

Q. And that was with what?

A. The Sheriff's Department.

Q. And Mr. Wright, have you ever used narcotics yourself? A. No, sir, I have not.

(Testimony of C. M. Wright.)

The Clerk: Government's Identifications 62 and 63.

(Copy of a letter to the Mayor of Odessa, Texas, was marked Government's Identification No. 62; Letter from Chief of Police, Lubbock, Texas, was marked Government's Identification No. 64.)

Q. (By Mr. Stevens): I hand you Government's Identifications 62 and 63, Mr. Wright; will you identify those for us?

A. Yes, sir, I will.

Mr. Taylor: Just a brief statement of what they are, Mr. Wright, please.

A. One of them is a letter from Mr. P. A. Williams, District Supervisor of the U. S. Treasury Department in Houston, Texas. The other from the Chief of Police of Lubbock, Texas.

Q. (By Mr. Stevens): Did you receive these letters as a result of your work? A. Yes, sir.

Q. As a Special Agent? [542]

A. Yes, sir.

Q. Now, Mr. Wright, how many trips did you make with Mr. Bennett?

A. Well, I went to Lubbock with him, went to Big Springs with him.

Q. And did you testify that you met him somewhere?

A. Yes, sir, I met him at Amarillo, Mink Club.

Q. And were you informed—strike that, will

(Testimony of C. M. Wright.)

you, please. Did Mr. Bennett know your identity at that time? A. No, sir, he did not.

Mr. Stevens: Your witness, Mr. Taylor.

Cross-Examination

By Mr. Taylor:

Q. When did you quit using narcotics, Mr. Wright?

A. Mr. Taylor, I am not a dope addict. I am not a loan shark, and I am not a shyster lawyer.

Q. Do you have those things down in Texas?

A. Sir?

Q. Do you have those things down in Texas?

A. We are trying to get rid of most of them.

Q. Now, Mr. Wright, yesterday upon examination I asked you a question regarding Mr. Kehert being—or you testified as to Mr. Kehert being in Odessa, Texas, on the 18th day of May, 1953. I asked you six different times if you saw Mr. Kehert there at the apartment of Mr. Bennett, did I not?

A. You asked me a lot of times. [543]

Q. And you said each time that he was there, that you saw him come up in a laundry truck?

A. Yes, sir, that's right.

Q. And you still say that that is true?

A. Yes, sir, I do.

Q. Now, I will hand you Defendant's Identification, Exhibit "A," which is a check issued to, by Mr. Kehert's employer on the 16th day of May, 1953, at Anchorage, Alaska, and cashed on the 18th day of May, 1953?

(Testimony of C. M. Wright.)

Mr. Stevens: I object to that. There is no evidence before this court that it was cashed on the 18th day of May. There is evidence here, if the jury wishes to find that it went through the bank on the 18th day of May. There is no evidence it was cashed on the 18th day of May.

The Court: Objection sustained.

Q. (By Mr. Taylor): And if also the record, Mr. Wright, shows that Mr. Kehert was in Anchorage up until the 5th day of June, 1953, would you still say that the evidence that you give was true as to him being in Odessa on the 18th day of May, 1953? A. Yes, sir, I sure will.

Q. You are still sticking to it?

A. Yes, sir, I am.

Q. And that testimony then is just as true as the other testimony you have been giving; is that right?

A. It is all true. [544]

Q. In spite of the fact that Mr. Kehert drew a check from his employer on the 16th, was cashed on the 21st, and that he was working there according to that one the 9th day of May?

Mr. Stevens: Just a moment. Mr. Taylor now says the check was cashed on the 21st. There is no evidence before the court as to when that check was cashed.

The Court: Let me see those checks.

Mr. Stevens: And to add, as my learned counsel over here says, the check speaks for itself. Thank you, Mr. Hurley.

Q. (By Mr. Taylor): Now, on the face of those

(Testimony of C. M. Wright.)

exhibits then, Mr. Wright, you are still saying that the statement you are making about Mr. Kehert is as true as the other statements you have made?

A. I didn't make no mistake about Mr. Kehert.

Q. No, your statement that he was in Odessa May the 18th?

A. Yes, sir, he was.

Mr. Stevens: Thank you, Mr. Wright.

(Witness excused.)

Mr. Stevens: Call Mr. Harkabus.

EDWARD J. HARKABUS

a witness called on behalf of the plaintiff, having been previously sworn, was recalled in rebuttal and testified further as follows: [545]

Direct Examination

By Mr. Stevens:

Q. This is Government's Identification 57, Mr. Harkabus, will you tell us what that is?

A. This is a warrant that was issued by Mrs. Nordale on July the 6th, and it bears the notation and my signature that the warrant had been served and I made the return on the bottom on July 7th. I returned it and stated that it had been served on the 6th.

Q. And when you arrested Mr. Bennett did you tell him he was arrested for aiding and abetting?

A. I did not.

Q. And when you arrested Mr. Kehert did anyone in your presence boot him around?

(Testimony of Edward J. Harkabus.)

A. They did not.

Q. Did you jump on him and put your pistol in his face, Mr. Harkabus?

A. When I opened the door and covered Mr. Kehert with my revolver? I testified to that. At no time did I put my pistol at his head.

Mr. Stevens: Your witness, Mr. Taylor.

Mr. Taylor: That's all.

(Witness excused.)

Mr. Stevens: Your Honor, we offer Government's Identification 57 in evidence.

Mr. Taylor: We object, your Honor, upon the grounds that they are not competent evidence. There is no [546] proceedings taken under that unless the final order of discharge by Mrs. Nordale is brought into court with them to show that there was no prosecution under that warrant of arrest and complaint. Highly prejudicial, your Honor, and they only attempted to be sought, to be introduced in this case.

Mr. Stevens: It is relevant to show that Mr. Bennett was not arrested for aiding and abetting.

The Court: Objection overruled.

The Clerk: Government's Exhibit "X."

(Government's Identification No. 57 was received in evidence as Government's Exhibit "X.")

Mr. Stevens: The government rests, your Honor.

Mr. Taylor: We rest.

The Court: Now, how much time do you need for argument?

Mr. Taylor: Oh, fifty minutes.

The Court: Is that satisfactory, fifty minutes to a side? Will counsel come forward, please?

(At this time the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: I just wanted to know if you want to waive the stenographer taking the first part of this. We have got all of the instructions out, but just aren't separated. It should take about ten minutes. If you want to waive having the stenographer in court, you can go right ahead with [547] your argument and she can go ahead with her instructions and she will come back as soon as she gets them ready.

Mr. Taylor: Would the Court rather argue this to the jury in the morning?

The Court: Oh, no; tomorrow is Saturday morning and some are very anxious to get it done today.

Mr. Taylor: I am anxious. I thought maybe it would be pretty late.

The Court: But right now what do you say about that?

Mr. Taylor: That's all right with me.

Mr. Stevens: Yes, your Honor.

(The following proceedings were had in the hearing of the jury.)

(The reporter left the courtroom and Mr. Yeager presented argument to the jury.)

(Mr. Taylor presented argument to the jury.)

(Mr. Stevens presented rebuttal argument to the jury.)

(At this time, the Court read the instructions to the jury as follows.)

INSTRUCTIONS TO THE JURY

(a) (1) Section 2421, Title 18, of the United States Code (New) provides in substance that whoever knowingly transports, in interstate commerce or in any Territory of the United States any woman or girl for the purpose of prostitution shall [548] be guilty of the crime denounced in said Section 2421, Title 18, U.S.C., and shall be fined or imprisoned or both as provided by such section.

(2) All persons are presumed to know their own acts unless the contrary has been shown.

(3) The word "feloniously" means the unlawful doing of an act which may be punished by imprisonment in the penitentiary, such as the crime charged in this case. The word "knowingly" as mentioned in Section 2421, Title 18, U.S. Code, is included in the word feloniously mentioned in the Indictment in this case.

(4) The word "prostitution" as used in the Indictment in this case means the practice of a female offering her body to indiscriminate sexual intercourse with men for hire.

(5) Although it is alleged in the indictment that

the crimes denounced therein were committed on or about the 28th day of June, 1953, it is only necessary that the plaintiff, the United States, prove beyond a reasonable doubt that the crimes denounced in said indictment were committed within three years prior to the date of the indictment, to wit, November 13, 1953.

(b) (1) Count I of the indictment in this case is as follows, to wit: "That Fern Bennett, also known as Betty McAllister; Norma Ruth Crosby, Wesley Kehert and James J. Bennett, also known as Jack Bennett, on or about the 28th day of June, 1953, in the Fourth Judicial Division, Territory of Alaska, then and there being, did then and there feloniously [549] transport in interstate commerce, to wit, from the State of Texas to the Territory of Alaska, a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution, in violation of Title 18, Section 2421, of the United States Code Annotated."

(2) The jury is instructed that if the United States of America, plaintiff, has proved each of the allegations of Count I of said indictment beyond a reasonable doubt, as to any one of the defendants, the jury should find such defendant guilty of the crime charged against him or her in Count I of said indictment.

(3) The jury is further instructed that if the United States of America, plaintiff, has failed to prove beyond a reasonable doubt, any one of the allegations of Count I of said indictment, as to any one of said defendants, the jury should find such

defendant not guilty of the crime charged against him or her in Count I of said indictment.

(4) Count II of the indictment in this case is as follows, to wit: "That Fern Bennett, also known as Betty McAllister; Norma Ruth Crosby, Wesley Kehert and James J. Bennett, also known as Jack Bennett, on or about the 28th day of June, 1953, in the Fourth Judicial Division, Territory of Alaska, then and there being, did then and there feloniously conspire to commit an offense against the United States, and did an act to effect the object of the conspiracy, to wit, transport in interstate commerce, to wit, from the State of Texas to the Territory of Alaska, in violation of Section 2421 [550] of Title 18 of the United States Code Annotated, a woman, to wit, Marilyn Jean Casey, for the purpose of prostitution in violation of Section 371 of Title 18 of the United States Code Annotated."

(5) The jury is instructed that if the United States of America, plaintiff, has proved each allegation of Count II of said indictment beyond a reasonable doubt, as to any two or more of said defendants, the jury should find such defendants guilty of the crime charged against him or her in Count II of said indictment.

(6) The jury is further instructed that if the United States of America, plaintiff, has failed to prove beyond a reasonable doubt, any one of the allegations of Count II of said indictment, as to any two or more of said defendants, the jury should

find such defendants not guilty of the crime charged against him or her in Count II of said indictment.

(7) Section 371, Title 18, United States Code (New) provides in substance as follows: That if two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined or imprisoned or both as provided for in said Section 371.

2.

The jury is instructed:

(a) That a conspiracy is constituted by an agreement; that it is, however, the result of the agreement and not the [551] agreement itself. No formal agreement between the parties is essential to the formation of the conspiracy for the agreement may be shown if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.

(b) The crime is complete when an overt act to effect the object of the conspiracy is done by at least one of the conspirators. All of the conspirators need not join in the commission of an overt act, for, if one of the conspirators commits an overt act, it becomes the act of all the conspirators.

On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the conspiracy statute unless he joined in the agreement.

(c) The overt act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation, and if the act of a conspirator be done with the purpose of putting the unlawful agreement into effect, it is sufficient, although it has no tendency to accomplish its object. The conspiracy is complete on the forming of the criminal agreement and the performance of at least one overt act in furtherance thereof, and, if several overt acts are charged in the indictment, it will be sufficient to show that one or more of those acts were committed in furtherance of the conspiracy.

The cases make it clear that actually transporting [552] a woman for the purpose of prostitution denounced by Section 371, Title 18, U. S. Code, constitutes the overt act required.

(d) The jury is instructed that the laws in force in Alaska in June, 1953, and thereafter make it clear that the actual transportation of women for prostitution contrary to the provisions of Section 2421, Title 18, United States Code, constitutes the overt act required by Section 2421.

(e) Proof of a conspiracy may be by circumstantial evidence, oftentimes by overt acts alone, in which case much is left to the discretion of the trial court. In such cases great latitude is allowed, and appellate courts will not reverse a case unless practical injustice has been done by the admission of irrelevant testimony.

(f) You are instructed that there are two general classes of evidence, direct and circumstantial. Evidence as to the existence of the main fact in issue is direct evidence, while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the main fact in issue.

It is not necessary to prove a case by the testimony of eyewitnesses, but the same may be established by facts and circumstances from which issues of the case may be reasonable and satisfactorily inferred.

Circumstantial evidence is to be regarded by the jury in all cases where it is offered. Sometimes it is quite as convincing in its power as the direct and positive evidence [553] of eyewitnesses, and when it is strong and satisfactory, the jury should so consider it, neither enlarging or belittling its force, but the circumstances when taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion.

3.

You are instructed that the necessary purpose and motive of the defendants herein need not be proved by direct evidence, for it may be shown by circumstantial evidence from which you the members of the jury have the right to infer purpose and motive. For instance, conduct of the parties involved in this case a reasonable time before and after the alleged transportation may be taken into consideration as circumstantial evidence to deter-

mine whether or not the alleged purpose or motive existed.

4.

You are instructed that certain testimony of the witnesses before this Court may have tended to connect the defendants, or at least some of them, with the commission of certain other illegal or immoral acts, and that you should consider this evidence only in relation to the issue of whether or not the defendants herein in fact had the motive or purpose to their trip to Alaska which the Government has charged in the indictment herein; you should not consider such testimony otherwise, for the defendants are only on trial before this court for the offenses set forth in the indictment. [554]

5.

You are instructed that the laws of the United States of America provide that "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal," and that in this case if you find that the defendants, or any one or more of them, aided, abetted, counseled, commanded, induced or procured the commission of the offenses charged in the indictment herein, such defendants, or any one or more of them, are guilty as principals or principal, as the case may be.

6.

You are instructed that if you find one or more of the defendants was, or were, not physically present in the vehicle in which Marylian Jean Casey

crossed the imaginary barrier between the Canadian-Washington boundaries and between the Canadian-Alaskan boundaries, such fact alone would not have any effect upon the guilt or innocence of the defendants herein, for the statute under which the indictment herein is brought cannot be evaded by the mere acts, as the crime stated in the indictment herein is the transportation of a woman for the purpose of prostitution from Texas to Alaska, not the mere transportation of a woman across imaginary lines, and one who transports a woman for the purpose set forth in the indictment herein, or one who aids in, or brings about such transportation is guilty of the offense charged. [555]

7.

You, the members of the jury, are instructed that you need consider the purpose of the defendants only in making the trip alleged to have been made from Texas to Alaska. The purpose of Marylian Jean Casey in making the trip is not material to the issues before this court. Therefore, the Government in this case need not prove that the defendants, or any of them, induced Marylian Jean Casey to come to Alaska, for even if she came to Alaska willingly and without coercion or inducement, you may find the defendants herein guilty as charged if the Government proves to you beyond a reasonable doubt all the allegations of the indictment herein.

8.

You are instructed that because of the nature of the offense, normally only the results of a con-

spiracy and not the actual plotting are observed, and that, therefore, to constitute an unlawful conspiracy, no formal agreement need be proved, and you the members of this jury may rely upon circumstantial evidence to infer the existence of a conspiracy in this case, providing you find that the circumstances of this case support the inference, beyond a reasonable doubt, that the defendants possessed a unity of purpose or a common design.

9.

You are instructed that although the Government called Marylian Jean Casey to testify in this action, because of the [556] obvious hostility of said witness toward the prosecution, this Court allowed the Government to show not only that she made prior statements inconsistent with her testimony before this Court, but also the Court has permitted the Government to offer her prior statements in evidence. These statements have been received in evidence to allow you, the members of the jury, to give the proper weight to the testimony which Miss Casey gave in this Court before you during the trial of this case.

10.

You are instructed that it is not necessary that the sole purpose of the trip alleged to have been taken by the defendants herein be shown to have been the transportation of Marylian Jean Casey for the purpose of prostitution, for it is sufficient if the Government has shown to you, beyond a reasonable doubt, that one of the dominant motives of the de-

endants was to transport Miss Casey so that she could engage in prostitution in Alaska.

11.

You are instructed that the Court has admitted into evidence during the course of this trial, certain items which have been brought before this Court as business records made in the regular course of business, and that all circumstances, including the lack of personal knowledge of the maker or entrant may be taken into consideration by you in determining the weight to be given to this evidence. [557]

12.

You are instructed that the statute under which the indictment in this case has been presented to this Court prohibits the interstate transportation of a woman for the purpose of prostitution and similarly prohibits transportation of a woman for the same purpose within the Territory of Alaska, and that, even though the original object of the trip alleged to have been made by the defendants herein may have been a lawful object, if you find that these defendants formed the unlawful design, charged in the indictment herein, before the completion of their alleged trip to Alaska, and all other material allegations herein have been proved to you beyond a reasonable doubt, you may find the defendants guilty as charged.

13.

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

2. That a witness wilfully false in one part of his testimony may be distrusted in others.

3. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which [558] it is in the power of one side to produce and of the other to contradict; and, therefore,

4. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

5. That oral admissions of a party should be viewed with caution.

14.

You are instructed as follows:

1. That you should not consider any evidence sought to be introduced, but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court.

2. That it is manifestly impossible for the Court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly.

3. That wherever in these instructions the masculine is used, it shall be deemed to include the feminine, unless the context shows it to be inapplicable.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence. [559]

5. That wherever in these instructions the singular is used, it shall be deemed to include the plural, unless the context shows it to be inapplicable.

15.

You are instructed that the indictment is a mere accusation and is not in itself any evidence of the defendant's guilt.

The defendant has pleaded not guilty to the matters set forth in said indictment. That plea puts in issue every material allegation of the indictment and puts the burden of proof upon the plaintiff to prove every such allegation beyond a reasonable doubt. The defendant is presumed to be innocent and until the plaintiff has proven every material allegation of said indictment beyond a reasonable doubt, the defendant is entitled to the continued benefit of the presumption of his innocence.

16.

In regard to the term "reasonable doubt" as used in these instructions and as defined by law, you are instructed as follows:

(a) If, after considering all of the evidence in the case, there is in the minds of the jury a fixed conviction that the defendant is guilty and that conviction arises out of the evidence in the case, the jury would be justified in considering that there is no reasonable doubt in the minds of the jury in the sense in which the term is used in law. [560]

(b) A doubt, to be such a reasonable doubt, must be actual and substantial and not a mere fanciful speculation. It cannot be a reasonable doubt if it ignores a reasonable interpretation of the evidence or lack of evidence within the power of a party to produce or arises merely from sympathy or a vague fear. The rule of law as to a reasonable doubt is a practical rule for the guidance of practical jurors when engaged in the solemn duty of assisting in the administration of justice and is not whimsical or fanciful. A mere possibility of error or mistake does not constitute a reasonable doubt. Despite every precaution that may be taken to prevent it, there may be in most human affairs a mere possibility of error. A doubt, to be a reasonable one, must have a real, substantial basis and not be mere fancy or conjecture. It must be such a doubt as would give rise to grave uncertainty and make the juror feel that he did not have an abiding conviction of the defendant's guilt. To prove a proposition beyond a reasonable doubt, the evidence or lack of evidence must be such that it would convince a prudent man of its truth to such a degree of certainty that he would feel like acting upon such

conviction in matters of the highest import to his own personal interests.

17.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which [561] they, as reasonable human beings, have and exercise in every-day affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

18.

You are instructed that a person charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness in his own behalf—the credit to be given to his testimony being left solely to the jury under the instructions of the Court.

You are instructed that in this case the credit to be given to the testimony of the defendant, who has voluntarily offered himself as a witness and testified in his own behalf, is left solely to you, and you should give it the same fair and candid consideration as you do the testimony of other witnesses in the case, but you have a right to take into consideration the interest of the defendant in the result of the trial as affecting his credibility.

19.

You are instructed that in the trial of a criminal case the person accused is a competent witness in his own behalf, at his own request, but not otherwise, the credit to be given to his testimony being left solely to the jury under the [562] instructions of the Court. If the defendant does not choose to appear as a witness in his own behalf, the laws of Alaska provide that his waiver to so testify shall not create any presumption against him, and you will, therefore, in this case not permit the failure of some of the defendants to testify to create any presumption in your minds against their innocence.

20.

Pursuant to the foregoing instructions, I have prepared a form of verdict which is self-explanatory.

Upon retiring to your jury room you should elect a foreman and by him or her sign the verdict upon which you unanimously agree.

Herewith I hand you these instructions for your guidance, together with the exhibits that have been introduced in evidence, the indictment in the case, and the form of verdict above mentioned. Return all of these in to Court with your verdict.

Dated at Fairbanks, Alaska, this 14th day of May, 1954.

/s/ HARRY E. PRATT,
District Judge.

(Insert in blanks the words “guilty” or “not guilty” or names, according to your finding.)

(At the conclusion of the Court reading the instructions to the jury, the following proceedings were had.)

The Court: Attorneys may come forward for exceptions. [563]

(The attorneys approached the bench, and the following proceedings were had out of the hearing of the jury.)

Mr. Taylor: If the Court please, I would like to take exception to Instruction No. 7. It is erroneous statement of the law in that the purpose, it states that the purpose of Marilyn Jean Casey is not material to the issues in this court, and also that such an instruction would mean that a person who embarked on an entirely innocent trip and transported anybody not knowing they were going to engage in prostitution, make them subject to prosecution.

The Court: Just one second. I will read that over again. Objection overruled.

Mr. Taylor: Then, No. 10. I think in view of the uncontradicted testimony, your Honor in this case that all of the defendants had planned to come to Alaska prior to meeting Marilyn Jean Casey, that the dominant motive of the defendants to come to Alaska was not the transportation of Marilyn Jean Casey to engage in prostitution in Alaska, because the dominant purpose of coming back was

to return to Anchorage. All the testimony is that they had planned to come before they ever met Marilyn Jean Casey.

The Court: Objection overruled.

Mr. Taylor: I believe that is all.

Mr. Stevens: No objections.

Mr. Taylor: I want to object further—further objecting, failure of the court to give defendants requested [564] Instructions Nos. 1, 2, 3, 4, 5, 6, 7 and 8.

The Court: Objection overruled.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

The Court: The jury may retire in the custody of the bailiffs.

(At 6:10 p.m., the jury, in charge of its sworn bailiffs, retired to enter upon its deliberations.)

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the District Court, District of Alaska, Fourth Judicial Division, Fairbanks, Alaska, do hereby certify as follows, to wit:

That I was the official court reporter for the above-named Court on May 10, 11, 12, 13 and 14, 1954, the dates upon which the cause of United States of America v. Bennett, et al., was heard;

That I recorded in shorthand all of the oral proceedings had in open court upon said dates; that the foregoing pages, numbered 1 through 565, inclusive, are a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 5th day of August, 1954.

[Seal] /s/ MARY F. TEMPLETON,
 Official Court Reporter.

Subscribed and sworn to before me this 5th day
of August, 1954.

/s/ JOHN B. HALL,
Clerk of the Court. [565]

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below comprise all proceedings listed by the defendant and appellant on his Designation of Record and the same on the Designation of Record and Additional of Record of the plaintiff and appellee, viz.:

1. Indictment.
2. Verdict.
3. Motion for New Trial.
4. Minute Order Denying Motion for New Trial.
5. Judgment and Commitment.
6. Notice of Appeal (in duplicate).

7. Designation of Record of Defendant and Appellant.

(Transcript of the Record of the Trial mailed previously by counsel for the defendant.)

8. Counter Affidavit in Regard to Motion to Suppress Evidence of Edward J. Harkabus.

9. Counter Affidavit of John W. Worsham, same matter.

10. Counter Affidavit of Edward J. Harkabus, same matter.

11. Affidavit of Theodore F. McRoberts.

12. Designation of Record of Plaintiff and Appellee.

13. Counter Affidavit of John W. Worsham, in re Suppression of Evidence.

14. Additional Designation of Record of Plaintiff and Appellee.

Witness my hand and the seal of the above-entitled Court this 16th day of October, 1954.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,551

JAMES J. BENNETT, a/k/a JACK BENNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

The appellant, James J. Bennett, hereby states that the points upon which he intends to rely upon appeal are as follows, to wit:

1. That the verdict was contrary to the evidence.
2. That the verdict is not supported by substantial evidence.
3. That the verdict is contrary to the law.
4. That the Court erred in overruling defendant's motion to suppress evidence unlawfully seized.
5. That the Court erred in admitting irrelevant, incompetent and immaterial testimony over the objection of defendant.
6. That the Court erred in refusing to give defendant's requested instructions Nos. One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7) and Eight (8).
7. That the Court erred in giving instructions Nos. Seven (7), Nine (9), Ten (10), and Twelve (12) to the jury, as not the law of the case.

8. That the Court erred in overruling defendant's motion for judgment of acquittal made at the close of the plaintiff's case and at the close of the entire case.

9. That the Court erred in overruling defendant's motion for new trial.

10. That the verdict of the jury was a coerced verdict for the reason that the said jury was required to consider said cause for a period of forty-four (44) hours.

/s/ WARREN A. TAYLOR,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 6, 1954.

[Endorsed]: No. 14,551. United States Court of Appeals for the Ninth Circuit. James J. Bennett, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Judicial Division.

Filed October 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 14,551

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES J. BENNETT,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the District of Alaska,
Fourth Judicial Division.

BRIEF OF APPELLANT.

GEORGE B. GRIGSBY,

Box 699, Anchorage, Alaska,

Attorney for Appellant.

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No. 14,551

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES J. BENNETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the District Court for the District of Alaska,
Fourth Judicial Division.**

BRIEF OF APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the District of Alaska, Fourth Division. The appellant was charged in the indictment with the crime of feloniously transporting in Interstate Commerce, to wit: from the State of Texas to the Territory of Alaska, a woman, namely, Marilyn Jean Casey, for the purpose of prostitution, in violation of Title 18, Sec. 2421, U. S. Code, Annotated. Transcript of Record, p. 3.

The appellant entered a plea of not guilty. After a trial by jury he was found guilty of the above de-

scribed offense and thereafter, on May 25, 1954, order and judgment was entered and the appellant was sentenced to imprisonment for five years. Notice of appeal was filed May 25, 1954.

The District Court had jurisdiction to try the case by virtue of the provisions of Secs. 53-1-1 and 53-2-1, Vol. 2, Alaska Compiled Laws, Annotated, 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Secs. 1291 and 1294 (2), New Title 28, U. S. Code.

II.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

1.

FACTS AND CIRCUMSTANCES.

James J. Bennett, the defendant-appellant, his wife, Fern Bennett, Norma Ruth Crosby, Marilyn Jean Casey, Wesley Kehert and Carol Ward left the State of Texas, on or about May 18, 1953, and arrived in Fairbanks, Alaska, on or about June 28, 1953. The party traveled by automobile using three cars, a Cadillac owned by the defendant Bennett, a Mercury, the title to which was in the name of Fern Bennett, and a Buick, owned by Wesley Kehert. Marilyn Jean Casey entered into a life of prostitution shortly after her arrival in Fairbanks. The defendant had no association with Marilyn Jean Casey prior to May 18, 1953, nor any association with her after her arrival

in Fairbanks, except to arrange temporary hotel accommodations for the party upon their arrival in Fairbanks. During the trip the defendant participated in arranging hotel accommodations at the places the parties stopped overnight. Marilyn Jean Casey paid her share of the expenses of the trip.

During the trip the parties traveled together and at numerous places stopped for the purpose of taking photographs of themselves in groups and as individuals. A great number of those photographs were put in evidence during the trial of the case.

Marilyn Jean Casey, the person named as the party illegally transported, testified as a Government witness. Her testimony did not in any degree implicate the defendant Bennett. However, she admitted having made statements while in custody on a charge of a criminal offense committed in Fairbanks or vicinity, to FBI officers and to the United States Commissioner at Fairbanks which did implicate Bennett. These statements were in writing and signed by her and were admitted in evidence as exhibits and went to the jury, together with other exhibits in the case.

The defendant was tried jointly with his wife, Fern Bennett, Norma Ruth Crosby and Wesley Kehert. The defendant and Wesley Kehert were convicted. Fern Bennett and Norma Ruth Crosby were acquitted.

2.

QUESTIONS INVOLVED AND HOW RAISED.**A.**

Whether or Not There Was Sufficient Evidence to Justify a Verdict of Guilty.

This question was raised by a motion made by counsel for the defense at the conclusion of the Government's case, for a judgment of acquittal. TR p. 398, and by the motion for a new trial. TR pp. 7, 8.

B.

Questions Raised on the Admission or Rejection of Evidence.

These questions were raised by objections made at the time of the rulings of the Court.

C.

Questions Raised by the Instructions of the Court and the Refusal of the Court to Give Certain Instructions Requested by the Defense.

III.**SPECIFICATIONS OF ERROR.****1.**

The Court erred in denying the motion for judgment of acquittal, made at the conclusion of the Government's case, on the ground that there was insufficient evidence to go to the jury to justify a verdict of guilty. TR pp. 398, 408.

2.

The Court erred in overruling the objection of the defendant to the admission in evidence of Government's Exhibit "O". TR p. 261.

The circumstances of its admission in evidence were as follows:

Marilyn Jean Casey, the person named in the indictment as the subject of the unlawful transportation, was called as a witness by the Government. Her attention was called to a prior extra-judicial written statement inconsistent with her present testimony. She was handed a written statement, "Government's Identification 30", six pages in length, signed by herself. TR pp. 58, 59.

Later in the trial this statement was admitted in evidence over the objection of defense counsel, as Government's Exhibit "O".

This exhibit does not appear in full in the record. Miss Casey was questioned regarding parts of the statement by the U. S. Attorney as follows:

"Mr. Stevens: Will you read the last question?

(The reporter read the last question as follows:

'And did you tell the FBI what it says in this statement here, that Wesley Williams said, "I hear you are thinking of turning out", and he said, "if you are, you better come to Alaska with us. Don't fool around with these \$5 tricks, they are getting \$20 up there." Did you tell the FBI that statement?'

A. Yeah, but it wasn't true." TR p. 65.

* * * * *

“Q. They, Jack Bennett and Wesley Williams, discussed crossing the Canadian border on several occasions, while we were on this trip. Both of them stated that they are known by the customs officials and stated that all girls should stay in one car. Before we crossed the line into Canada, I recall that Bennett stopped at a small town where he purchased a plastic set and other groceries.

A. No, I didn't say that.” TR p. 66.

* * * * *

“Q. (By Mr. Stevens): Miss Casey, again from Page 4, it says, ‘Prior to Norma Crosby’s driving across the Canadian Border, it had been discussed by the girls, Norma Crosby, Fern Bennett, Carole and myself that we were to travel to Alaska and work as prostitutes. Norma had knowledge that all the girls were to work as prostitutes. About fifty miles after we crossed the border, we stopped along the highway and changed cars again.’ Did you tell the FBI that statement?

A. Yes, but it wasn't true either.” TR p. 68.

* * * * *

“Q. On page 5, Miss Casey, it states, ‘The first night I worked as a prostitute was June 30, 1953. I worked out of the Southside Bar located on 15th and Cushman. I turned six tricks at \$20 each. I earned \$120. I gave it all to Wesley Williams. Williams, in turn, gave me \$4 back and said If I had the rest of the money I would just spend it. I took the tricks to a cabin located across from the Transient Rooms. This cabin was rented by Wesley Williams from * * * Murphy.’ Would you like to read that, too?

A. No.

Q. Did you tell that to the FBI?

A. Did I?

Q. Yes.

A. Yes, but it wasn't true." TR pp. 72, 73.

After each of the above questions Miss Casey was cross-examined at length by Mr. Stevens as to the circumstances of her signing Government's Identification 30 and as to its contents.

The grounds urged at the trial for the objection to the admission in evidence of Government's Exhibit ("O") were as follows:

"Mr. Taylor. We are objecting to that, your Honor, on the grounds that it was made under duress, threats, promises and was prepared according to the testimony of the witnesses by others than Miss Casey. We don't feel, not sworn to, your Honor, and would have no bearing upon the issues of this case." TR p. 261.

IV.

ARGUMENT.

1.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

There was no substantial evidence in the case that the defendant-appellant James J. Bennett transported Marilyn Jean Casey from the State of Texas to the Territory of Alaska, or that he so transported her or aided and abetted in her transportation, for the purpose of prostitution.

Certain facts may be conceded, as follows:

That the defendant made the trip from Texas to Alaska together with his co-defendants, Fern Bennett, Norma Ruth Crosby, and Wesley Kehert. With the party were a girl known as Carol Ward, and Marilyn Jean Casey, named in the indictment as the woman feloniously transported.

The party left Texas on or about June 18, 1953, and arrived in Alaska on or about June 28, 1953; they traveled in three automobiles, a Cadillac owned by defendant Bennett, a Mercury owned by Fern Bennett, and a Buick owned by Wesley Kehert.

Fern Bennett was the defendant's wife.

When these persons left Texas they were all more or less acquainted with one another. They associated freely together; took many photos of one another in groups and individually; the men extended the usual courtesies to the women or girls, which men usually extend to women in like circumstances.

On the trial, twenty witnesses testified against the defendants. Their testimony will be discussed in the order they testified.

Marilyn Jean Casey, TR pp. 25-119, 359, 360

Miss Casey did not testify to a single fact or circumstance tending to establish the guilt of the defendant-appellant, James J. Bennett.

Written statements, made by her before the trial, and inconsistent with the testimony she gave on the

stand, were admitted in evidence as Government's Exhibit "O". The admissibility of this exhibit will be hereinafter discussed.

Henry W. Denike, TR pp. 120-129

This witness testified that he lived in Denver, Colorado. He was the superintendent of the Western Union Telegraph Company there. That on June 22nd he cashed a telegraphic money order for Wesley Kehert at the Denver office. Nowhere in his testimony did he make any reference to the defendant James J. Bennett.

Rita Ellemeier, TR pp. 129-136

This witness was also brought from Denver, Colorado. She testified that she was the manager of the Ranch House Motor Hotel in Denver; that Mr. and Mrs. Kehert registered at her hotel on June 21, 1953. TR p. 133. There were two in the party. This witness made no reference to the defendant James J. Bennett.

Ruth E. Hoffman, TR pp. 137-142

This witness was also brought from Denver, Colorado. She testified that she owned the Royal Motel in Denver; that a registration card filled out by the registrant, showed that J. J. Bennett, wife and family, Odessa, Texas, registered at the Royal Motel in Denver on June 21, 1953; that there were four in the party; that their car was a Cadillac, BB 6235. TR p. 140.

Artie Reynolds, TR pp. 143-151

Artie Reynolds was also brought from Denver, Colorado. He testified that in June, 1953, he worked at Al's Service Station in Denver; that he saw Bennett, the defendant, in Denver in June, 1953; that in the latter part of June he serviced three cars, a Mercury, driven by Bennett, a Cadillac, driven by a lady, and a Buick; he serviced the Mercury and the Cadillac on one day and the Buick the next day; he talked with Bennett the first day they came in; Bennett told him he was from Odessa, Texas.

TR pp. 144-145

The next morning the three cars drove in; he let them park there and he asked the witness to service the Buick; they had been back after it after they got through eating and so they left; that was the last time he saw them when they came back.

TR p. 147

All the servicing he did was charged to the same credit card.

TR p. 148.

William Henry Burton, TR pp. 152-162

Burton testified that he resided at Oliver, B. C., Canada; that he was the Canadian Immigration Inspector stationed at Osoyoos, B. C., Canada, on the Canadian-American Border, and in the course of his duties he checked vehicles as they traveled across the Border; that around the 23rd or 24th of June, 1953, he inspected a car driven by Mr. Bennett, the defendant; that Mr. Bennett was alone at the time; that it

was about twenty minutes to four; that after questioning Bennett, he admitted him in transit to Alaska; that there were two other cars at the Border when he checked Bennett's car, a Cadillac and a Mercury hard-top; that he went off shift at 4:00 o'clock and the last car he checked that night was Bennett's.

TR pp. 152-154

On cross-examination Burton said that he had testified to the time Bennett passed through the Customs by checking back in his own memory; that Osoyoos is two miles north of the Border between Washington and Canada; that he thought he knew Bennett. TR pp. 158-161.

Vern V. Murphy, TR pp. 163-169

Murphy testified that he lived at the Trails End Motel in South Fairbanks, Alaska; he had known Wesley Kehert since 1951, met him at his motel; that in August, 1951, he and Kehert remodeled a quonset hut behind the motel for the purpose of operating a bawdy house; that he met Kehert again about July 1, 1953, at the motel office and Kehert asked him if he had a vacancy in the Trails End Motel; that he did have a vacancy, Cabin No. 12, which was engaged and moved into by Kehert; that Kehert rented that cabin for about three days; that at the end of three days he heard that they were picked up or that there was a raid of some kind; that he read it in the papers; that as far as he, Murphy, was concerned there were no occupants of the room he had rented, it was just Kehert that rented the cabin. TR pp. 163-168.

Murphy further testified that he did not see Bennett at his motel in June, 1953, nor around the first part of July; that he didn't see Mr. Bennett at all; that he didn't see anyone at Cabin No. 12; he didn't see anyone come or go in that cabin. TR p. 169.

Silas M. Packard, TR pp. 170-182

Packard testified that he lived at Tok Junction, Alaska; was United States Immigration Inspector there, his duties being to examine people entering Alaska from Canada and to make reports on persons that go through this station at Tok. Mr. Packard produced page 62 of the records of the United States Immigration and Customs Station, Tok Junction of June 28, 1953. TR pp. 170-171.

Reading from this record Packard testified,

“There was a Texas car, license BW-6235, four door Cadillac driven by James J. Bennett, and an Indiana license car WB-4848, Buick, two door, driven by Wesley Kehert. No other passengers in either of those cars. Then there is a Texas licensed car KS-7118, a Mercury coupe, driven by Fern Bennett, with three other passengers.”

Packard testified that it was a normal procedure to ascertain who is driving the vehicles at the Border, and to interview all of the other passengers in the vehicle at the time, but they only kept the names of the drivers; that they were all women in the one car. TR p. 175. Mr. Packard further testified that he could identify the faces of some of the persons listed but was not sure as to which was which; that it was

quite a while ago and at the time he didn't have any reason for attempting to remember them. TR p. 179.

Earl Wyman, TR pp. 182-195

Wyman testified that he was in the photographic business in Fairbanks, Alaska, and developed certain rolls of film at the request of the FBI and printed some of the pictures therefrom.

Howard K. Hudson, TR pp. 195-199

Hudson testified that he was a member of the Armed Forces stationed at Eielson Air Force Base, near Fairbanks, Alaska, in June, 1953. That he met Marilyn Jean Casey at the South Side Bar the latter part of June or the 1st of July; that at that time she was using a 1953 Buick; that he went to the Trails End Motel with Miss Casey; he had sexual relations with her for which he paid 15 bucks. TR pp. 195-197.

Hudson testified that he was subpoenaed to come to Fairbanks from Andrews Air Force Base, Washington, D. C.; that he thought the license plate on the car Miss Casey was driving the night he went with her was Indiana.

That he never knew Mr. Bennett. TR p. 199.

John W. Worsham, TR pp. 200-235, and

Edward J. Harkabus, TR pp. 235-298, 575, 576

These two witnesses were FBI agents at Fairbanks. They testified at length as to the ex-parte statements made by Marilyn Jean Casey to themselves and to the U. S. Commissioner at Fairbanks prior to the trial.

They testified to the contents of said statements and the circumstances under which they were made. They identified numerous rolls of film taken from one or both the defendants, Bennett and Kehert, and some receipts for gasoline purchased by Bennett while en route from Texas to Alaska, and taken from him on the occasion of his arrest on July 6, 1953.

They gave no testimony showing any association between the defendant Bennett and Marilyn Jean Casey after their arrival in Fairbanks.

C. M. Wright, TR pp. 298-333, 511-515

Wright testified that he resided in Odessa, Texas, between April and July of 1953, at the time being a Special Agent for the Federal Bureau of Narcotics; that the first time he met defendant, Bennett, was in Odessa about April 4, 1953. TR pp. 298, 299.

At this point in the course of Wright's testimony, during a consultation between the Court and respective counsel out of the hearing of the jury, Mr. Stevens made an offer of proof as follows:

"Your Honor, the Government offers to prove by this witness that between the time this witness met Mr. Bennett and the time Mr. Bennett came to Alaska he was working as an undercover agent for the Federal Bureau of Narcotics. He was posing as a friend of Mr. Bennett's and had many conversations with him relating to the crime before the court which does not discuss narcotics or any discussion relating to narcotics. Our discussion would be purely relating to the crime before this court, transportation for the purpose of prostitution." TR pp. 299, 300.

Objection to the offer having been overruled, the witness testified as follows:

He and Federal Agent Pizzeni met Jack Bennett, the defendant, and Carolyn Wright at the Mink Club in Amarillo, Texas, sometime in May, 1953, and at that time he had a discussion with Bennett. TR pp. 300, 301. That morning it had been arranged that he and Pizzeni were to meet Jack Bennett that night at the Mink Club, in order to purchase three ounces of heroin.

On motion of the defense, the last statement of the witness was stricken and the jury instructed to disregard all stricken evidence. TR p. 303.

The witness continuing:

He had a discussion with Jack Bennett that morning and Bennett told him at that time that he had to go to Pampa in order to pick up a prostitute that he was—

After objection to this testimony and argument between counsel, the objection was overruled, but the witness, Wright, did not finish his answer. TR p. 307.

The witness continuing:

He saw Jack Bennett again on the 18th of May, 1953, in Odessa; Carolyn Wright was with him. Bennett and himself drove to Big Springs, no one went with them; he had a conversation with Mr. Bennett as they drove to Big Springs. Jack Bennett told him that he was going to take his girls back up to Anchor-age and how much money he could make there through the girls he would take up there, and revealed to him

some of the things that happened at his prior time, trip to Anchorage. TR pp. 307-309.

When they returned from Big Springs he saw Norma Crosby, Betty Bennett and Steve Williams at Jack Bennett's apartment at the Arrowhead Courts in Odessa, and had a discussion with them, all of them except Steve Williams; Carolyn Wright, Jack Bennett, Norma and Betty Bennett all were at the apartment. TR p. 309.

Jack was telling them how much money could be made in Alaska, and while they were talking Williams drove up in an Odessa Steam Laundry truck; he, Wright, made another trip with Bennett to Lubbock, on May 20, 1953; Norma, the red-headed girl, was with them; Norma had one black eye and one side of her face was bruised very badly with a long scratch down it; Witness asked her how this appearance came about.

At this point in Wright's testimony, upon objection to the question, Mr. Stevens made another offer of proof out of the hearing of the jury, as follows:

"Your Honor, the offer is that the answer by the defendant Crosby was that she told this witness that she had been worked over by Jack Bennett because she had been prostituting for nothing, and that after Mr. Bennett got out of the car the conversation continued and that she, the defendant Crosby, discussed prostitution openly and freely with this witness."

TR pp. 310, 311

To the foregoing offer of proof the objection of the defense was sustained, but the matter is inserted here

for the purpose of showing the disposition of the witness Wright to blacken the defendant Bennett.

The witness continuing:

He had known Mr. Bennett for sometime in Odessa, and had seen him on several occasions, not to meet him personally at all; that during the period he heretofore discussed he saw him very often, every two or three days, at least.

TR pp. 314, 315

That he saw Bennett and other defendants about the 18th of June at Bennett's apartment in the Arrowhead Courts in Odessa, Texas, and had a discussion with them; there were present Jack Bennett, himself, Carolyn Wright, Betty Bennett and Norma; the conversation was about their activities at the place; they were working at the Highway Auto Courts where they were prostituting; Jack Bennett was talking to Carolyn Wright and he told her he had a place in Las Vegas, Nevada, at the Sand Hotel.

TR pp. 312, 313

Counsel for defendant at this point objected to the last answer of the witness. The Court sustained the objection. However, the jury heard it. This matter is inserted to show the disposition of Mr. Wright to portray Bennett to the jury as a man of bad character.

The witness continuing:

Mr. Bennett discussed the trip to Alaska before him, Wright, that they subsequently took.

“By Mr. Stevens:

Q. What was the part of the discussion that you had that night on the 18th of June that per-

tained to Alaska, leaving out any reference to Nevada?

A. Well, he told Carolyn that he would leave her at this place on their way to Alaska, about how much money could be made there."

TR pp. 313, 314

Mr. Wright left out the word "Nevada" but accomplished his purpose.

The witness continuing:

He was doing no other work than that in relation with the Federal Bureau at the time under discussion; he had a business prior to that time; he owned a finance company and a motor company.

Wright further testified that he only drank Bennett's whiskey when he was trying to purchase narcotics.

TR p. 322

He testified that when the party left Odessa he didn't know what direction they took; that the Texas Rangers were after them; that they left for Houston; they lost track of them until they were picked up in Fairbanks.

TR pp. 324-325

That in a discussion with Bennett about his trip to Anchorage, Bennett told him how much money he could make from his girls prostituting in Anchorage.

TR p. 327

Wright testified that he was not working with the Sheriff's Department in Odessa, Texas; that he was trying to stay out of their way.

TR p. 328

He testified that he was dodging the Sheriff on the 18th of June, 1953; that Jack Bennett was buying them off to let his girls operate; that he didn't want the Sheriff to see him with Bennett for fear they might tell him who he was.

TR p. 329

He testified that Jack Bennett had accused him of being an agent several times, but wouldn't have took him in to the people he did if he had known he was an agent.

TR pp. 329-330

He testified that the trips he took with Bennett were to purchase narcotics; that they were not successful.

TR p. 331.

Barbara Rogers, TR pp. 333-337

This witness did not testify to any fact or circumstance material to the charge in the indictment or relating to the defendant James J. Bennett at all, except that a man was introduced to her as Mr. Bennett in a night club in Anchorage.

N. D. McCown, TR pp. 339-353

This witness was brought to the trial from Galveston, Texas. He testified that he and his partner Tony Cifu saw Marilyn Casey at 2710 Post Office Street in Galveston on June 14, 1953; that house was known to him as a house of prostitution; at that time she propositioned him; asked him if he wanted it.

TR pp. 347-348

McCown was shown a picture and recognized the girl in the picture as the girl he had seen in Galveston, referred to in his previous testimony.

TR pp. 348-349

Harold F. Prosser, TR pp. 354-355

Prosser testified that the picture recognized by N. D. McCown as Marie Sheridan was identical to the picture of Marilyn Jean Casey taken in the Federal Jail.

TR p. 355

Beulah Whispell, TR pp. 360-365

This witness testified that she was the owner of the 5th Avenue Hotel located at 637 Fifth Avenue, Fairbanks, Alaska; that she was operating that hotel in June and July of 1953 and kept records and registrations of persons staying at her hotel; her records showed that a party of four came to her hotel together and remained there until they were arrested; that they were arrested; that it was her understanding that Bennett's wife occupied the same room as Bennett and the other two girls had another room; that the other two girls gave their names as Norma Barkly and Mary An Persine; that they were registered from Odessa, Texas.

Walter R. Brown, TR pp. 367-390

This witness was brought from Odessa, Texas. He testified that he lived in Odessa, Texas, in June 1953; that he knew James Bennett and Betty Bennett.

This witness was shown Government's Exhibit "R", a picture of Marilyn Jean Casey, and testified he had seen that girl come by the Highway 80 Courts in Odessa, Texas, once or twice, with Mr. Bennett; he knew other girls at the Highway Courts, not with Mr. Bennett; he saw a girl Sharon there with Betty Bennett; he portered part-time at the Highway 80 Courts.

TR pp. 367-368

Over the objection of defendants' counsel, the witness testified:

Betty Bennett was a prostitute at the Highway Courts; he didn't have any connection with her; he derived money from these prostitution activities; while the main porter was gone he went up and asked Betty for it; he had it coming from dates; he would send guys around to the other porter and he would take them around; he got money from Betty Bennett once.

TR pp. 369-370

The witness pointed out and identified the defendant Betty Bennett and also the defendant Norma Crosby as the girl he knew as Sharon.

TR p. 370

The witness testified that all he knew about Mr. Bennett while he, Brown, was there, was that Bennett was some kind of a used car dealer; that he was buying cars and selling them in Lubbock; he had seen him driving several different cars, an Oldsmobile once or twice, and a Cadillac once or twice, he saw a two-tone

Mercury, a new Mercury at the Highway 80 Courts once or twice.

TR p. 371

Cross-examination:

Mr. Brown testified that he never was employed at the Highway 80 Courts, he just worked there part-time to help another boy.

TR p. 372

He testified that the Highway 80 Courts was an auto court, a motel.

TR p. 373

He did not remember when he first saw Betty Bennett at the Highway 80 Courts; he seen her there once or twice; he just stopped there with her car; from the time he went to work there in 1952 up until the time he came to Fairbanks, he saw Betty Bennett about twice at the Highway 80 Courts; he never saw her there with Mr. Bennett.

TR p. 374

He heard Mr. Bennett say once or twice that he was going to pick up some cars the next day; he understood that his business was selling cars; he came to the Highway Courts once or twice to spend the night; that was the only time he saw Mr. Bennett.

TR p. 375

He testified that he was not still working there; that he quit about November or October last year (evidently referring to 1953).

TR p. 376

He saw Mrs. Bennett a couple of times at the Highway 80 Courts during the period he worked there; Mr. Bennett stayed there one night and one night he just came by; those were the only two times he ever saw Bennett; he recognized him in the courtroom from the time he came out there to Highway 80 Courts; the night he stayed there he talked to him; he knew he gave Bennett room 7.

Bennett told him he had just bought that Oldsmobile, was going to put it up on a lot in Lubbock or Amarillo somewhere; that was the only time he talked to Betty.

TR pp. 380, 381

He got some money from Betty Bennett one time. He had gotten money from other people who had come to the motel; the other guys told him to go around and collect some money; that is what he did; he collected \$25-30 dollars; he didn't know what they owed; he didn't get any of that; was supposed to but didn't; the other porter went to eat, took the money with him and he was left holding the bag; he didn't know what the money was for; he didn't ask the man that sent him to collect; if they wanted liquor at the motel he would get it for them. They had no liquor at the motel; there was a little bootlegging on the side.

TR pp. 382, 383

On redirect examination the witness was shown Government's Identification 55. He testified that he recognized it as a statement signed by him; he believed that the date on the front page was the right date;

he didn't put the dates on the statement; Mr. Wright put them down in Odessa; he saw one thing in there about some other girl; he meant that he told them he didn't know anything about her but he got it down that he did.

TR pp. 386-388

On recross-examination Marilyn Jean Casey was called and entered the courtroom. The witness was asked to look at her and state whether he had ever seen her before. The witness testified that he had never seen her.

TR pp. 389, 390

The foregoing summary of the Government's case includes everything that his counsel could glean from the record relating to the appellant James J. Bennett. It includes all the testimony against him, whether or not relevant and material to the crime charged in the indictment. It shows an attempt by the prosecution to prove that Bennett was a bad character, was involved in criminal activities, the sale of narcotics and prostitution. When Government witness, C. M. Wright, was introduced to the jury as an FBI narcotic agent, a prejudice against Bennett was at once created. The ordinary jury is prejudiced against dope peddlers, even more so than against white slavers.

The witness Wright did not succeed in connecting Bennett with any illegal activity of any kind. He took the stand in his own defense. His testimony comprises sixty-six pages of the typewritten record. On cross-examination the United States Attorney went into his

whole past life and did not succeed in proving a single illegal transaction.

On the contrary Bennett's testimony establishes that he was born in Texas, lived most of his adult life in Odessa, was a used car dealer, owned his home and other property, had credit with the Motor Investment Company, 808 Seventh Street, Fort Worth, Texas, dealt with the Lincoln-Mercury people and several other corporations, and had credit with them. He had gasoline credit courtesy cards; he was in good standing with the firms and corporations he had dealt with for a couple of years prior to the trip to Alaska, which resulted in his arrest.

He was born in Texas and lived most of his life in and around Odessa, except a period of five years, during which he lived off and on in Anchorage, Alaska, where he drove taxi cabs. The prosecution, according to the record combed his activities both in Texas and in Alaska, in an effort to find something in his record reflecting upon his character, and were unable to discover that he had ever been even charged with any offense until the indictment in this case was brought against him. They were unable to prove that the appellant has ever had any connection or association with Marilyn Jean Casey before or after she came to Alaska.

This being the status of the case against Bennett, the prosecution sought to prove his guilt by introducing in evidence, ex-parte statements of Miss Casey, made prior to the trial and not in the presence of Bennett. These ex-parte statements of Miss Casey

were not admissible in evidence for any purpose and were not evidence against Bennett.

During the trip from Odessa to Alaska, the appellant used his own name and his wife's name at all the places where the party stopped, and in crossing the border from the United States to Canada and in crossing the border from Canada into Alaska. He had proper identification for himself, his wife, and his automobile. He had nothing whatever to do with Marilyn Jean Casey, before the trip, during the trip nor after the party arrived in Fairbanks. The Motion for Judgment of Acquittal should have been granted.

2.

ERRORS IN THE ADMISSION OF EVIDENCE.

Error is assigned on the admission in evidence of Government's Exhibit "O".

Specification of Error 2.

Exhibit "O" consisted of a series of prior, ex-parte statements made by the Government witness Marilyn Jean Casey. While on the stand she denied the truth of those facts of her prior statements, which tended to establish the guilt of the defendants.

The prosecuting attorney was permitted to treat Miss Casey as an adverse and recalcitrant witness and to cross-examine her at great length regarding her prior inconsistent statements.

In *U. S. v. Block, et al.*, 88 F. (2d) 618, prior statements of a recalcitrant government witness were allowed to be put in evidence. The trial judge instructed the jury not to consider any part of the statement not admitted by the witness.

The Appellate Court (L. Hand, Circuit Judge) in its opinion stated:

“The judge’s charge mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said.”

U. S. v. Block, supra, pp. 619, 620.

Following the above, the Appellate Court further stated:

“For this reason the conviction of Levy cannot stand, though there was enough other evidence to sustain a verdict against him.” Opinion (3-5) p. 620.

And the opinion proceeds to draw the distinction between other evidence sufficient to support a conviction and other evidence overwhelmingly establishing the defendant’s guilt. The opinion concedes the error in the admission in evidence of prior inconsistent statements, and holds the error prejudicial because the other evidence in support of the conviction of the defendant Levy was not overwhelming, and the original inconsistent statement of the recalcitrant govern-

ment witness, David Block, may have “turned the scale.”

In the present case the prior inconsistent statements of the Government witness Marilyn Jean Casey were not only erroneously admitted in evidence but admitted as an exhibit in the case and went to the jury as Exhibit “O”. Although pure hearsay they went to the jury as substantive evidence, and were not supported by other evidence sufficient to support a conviction, and the error could not have been “mended” by the judge’s charge, Instruction 9, TR p. 526, nor by any amount of mending instructions.

The error could not be cured. *DeGroot v. United States*, 78 P. (2d) 244, (4, 5), (6) pp. 249, 250.

Kuhn v. United States, 24 P. (2d) 910 (9th Circuit) is exactly in point.

In that case a recalcitrant government witness was examined at great length by the prosecution, as detailed in the opinion, in the same manner as was done in the present case. However, in the *Kuhn* case, the district attorney of his own motion “consented that all objections be sustained, and that all the testimony be withdrawn from the consideration of the jury”, and therefore the Court struck out the testimony, with an admonition to the jury not to consider it, and again in the final instructions explicitly so advised the jury. The Court further stated in the opinion,

“While, in view of these repeated admonitions and the other circumstances of the case, we are unable to believe the original error was prejudi-

cial. We deem it proper to express our disapproval of the practice here indulged.”

Kuhn v. U. S., supra, page 913 (1-3).

In the present case the objectionable testimony was not only not withdrawn and the “original error” cured as far as possible, but on the contrary the original error was aggravated as far as possible by the admission of the objectionable testimony as an exhibit, to remain with the jury at all times during their deliberations, and as over-emphasized substantive evidence. As far as the circumstances of the case are to be considered, there was no evidence in the case relating to the appellant, James J. Bennett, that was not consistent with his innocence of the crime charged in the indictment, except the objectionable prior inconsistent statements of Marilyn Jean Casey. The opinion in the *Kuhn* case concedes the admission of this class of testimony to be error, but in view of the repeated admonitions of the Court and other circumstances of the case, not prejudicial error. In the present case there were no admonitions, and no other circumstances curing the error.

The objection urged by defense counsel to the admission of Government’s Exhibit “O” was that it was made under duress, threats, promises, etc. The objections urged in this argument were not included. The questions of duress, etc., are not discussed in this argument. The errors in the admission of Exhibit “O”, and the circumstance of its admission, are so egregious that counsel for defense deem it within the power and duty of this Appellate Court to hold the

error prejudicial. To discuss the question of duress, would require an analysis of many pages of testimony. Counsel feels safe in assuming that such an analysis is unnecessary.

Eliminating the erroneously admitted Government's Exhibit "O" from consideration, there was nothing left in the record to support a conviction of the appellant James J. Bennett.

The judgment of the lower Court should be reversed.

Dated, Anchorage, Alaska,
November 7, 1955.

GEORGE B. GRIGSBY,
Attorney for Appellant.

No. 14,551

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES J. BENNETT,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

REPLY BRIEF OF APPELLANT.

GEORGE B. GRIGSBY,

Box 799, Anchorage, Alaska,

Attorney for Appellant.

FILED

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No. 14,551

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES J. BENNETT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.**

REPLY BRIEF OF APPELLANT.

ARGUMENT.

Throughout appellee's brief numerous cases are cited in support of legal principles asserted by appellee.

In general appellant concedes the legal principles and that the authorities cited support them. They serve, however, only to confuse the issues here.

DiCarlo v. U. S., 6 F. 2d 364, is cited on page 5 of appellee's brief.

In that case the veracity of a government witness was impugned because of an apparent motive to fabricate. The prosecution was permitted to prove that

the witness made statements, consistent with his testimony, before the motive arose. The case has no application here.

Craig v. U. S., 81 F. 2d 816, 828, is cited on page 6 of appellee's brief. It is not in point because Marilyn Casey's testimony at the trial, "viewed in conjunction with the testimony of other witnesses", did not contribute to the government's case. She testified to no material fact in dispute.

Wright v. U. S., 175 F. 2d 384, 387, and *Schrader v. U. S.*, 94 F. 2d 926, are cited on page 8 of appellee's brief in support of the principle that one who aids and abets in transportation for the purpose of prostitution is guilty under the Act. The principle of law has long been well established.

Mellor v. U. S., 160 F. 2d 757, 764, and *Hart v. U. S.*, 11 F. 2d 499, 501, are cited on page 8 of appellee's brief, in support of the proposition that the fact that Bennett and Kehert were not with Casey when they passed through the points of immigration inspection, is immaterial.

This proposition is conceded. No question was raised in appellant's brief in this regard.

Mortensen v. U. S., 322 U.S. 369, is cited on page 8 of appellee's brief.

Immediately preceding this citation the brief states,

"Casey testified that she wanted a vacation and she suggested the trip. If there was evidence to support the vacation theory, and the government had not rebutted such a contention, Appellee would confess error on the basis of the *Mortensen* case, 322 U.S. 369 (1944). However, the jury had

ample evidence to show that Bennett's purpose was to get all of the girls to Alaska so they could ply their trade (Mellor v. U. S., supra, 764), and it was the purpose of Bennett and Kehert that the jury were considering, not Casey's."

There was no substantial evidence adduced at the trial that Bennett's purpose was to get all of his girls to Alaska so they could ply their trade.

In making the above statement the United States attorney must have had in mind the testimony of C. M. Wright to the effect that on May 18, 1953 Jack Bennett told him that he was going to take his girls back up to Anchorage and how much money he could make up there through the girls he would take up there. (T.R. pp. 307-309.)

Wright's testimony against Bennett consisted solely of alleged admissions made by Bennett to him as to various illegal activities of Bennett in Texas, relating to narcotics and prostitution, all in an attempt to portray Bennett as a man of bad character. He was not discouraged in this attempt by the United States attorney, but persisted in this conduct in spite of frequent admonitions of the trial court to desist therefrom, thus revealing his personal animosity toward Bennett.

Mallory v. U. S., 126 F. 2d 192, 193, and *Kelly v. U. S.*, 297 Fed. 212, 213, are cited on page 8 of appellee's brief.

In the cases cited the appellate court held that the testimony amply supported the verdict of guilty. Judging from the review of the testimony in the

Court's opinions in these cases, it is apparent that the Court's conclusion was justified.

Shama v. U. S., 94 F. 2d 1, 4, and *Alpin v. U. S.*, 41 F. 2d 495, 496, are cited on page 9 of appellee's brief. This appellant concedes that the law is well stated in these decisions and that the convictions were based upon sufficient evidence.

Dodson v. U. S., 215 F. 2d 196, 200, is cited on page 9 of appellee's brief.

In that case the incriminating statement of the defendant was made to the victims themselves. On the strength of that statement and other evidence in the case, the conviction was upheld.

Tedesco v. U. S., 118 F. 2d 737, 740, and *Lawrence v. U. S.*, 162 F. 2d 156, 158, are also cited on page 9 of appellee's brief.

These decisions related to the admissibility of evidence of other offenses to prove intent, motive and guilty knowledge, and clearly state the law applicable to the facts proven.

The appellant is indebted to the appellee for citing *Mortensen v. U. S.*, 322 U.S. 369. On page 374 of the opinion in that case it is stated,

“we would normally be precluded from reviewing or disturbing the inference of fact drawn from the evidence by the jury. But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict.”

An examination of the record in the present case will demonstrate to this Appellate Court that the

verdict in the *Bennett* case was not supported by competent and substantial evidence.

Appellee's brief, page 5, last paragraph, states:

"No attempt is here made * * * to take advantage of the prior contradictory statements of Marilyn Casey as affirmative evidence."

It is submitted that there was a palpable attempt to take such advantage; that the appellant was convicted on the prior *ex parte* statements of Marilyn Casey which were admitted as substantive evidence, an error which could not be cured and was not cured by the trial court's instructions.

CONCLUSION.

Appellee's brief ignores *U. S. v. Block et al.*, 88 F. 2d 618, cited on page 27 of appellant's brief, and *Kuhn v. United States*, 24 F. 2d 910, cited on page 28, both of which are exactly in point as shown in appellant's brief, pages 26-30.

The *Kuhn* case is erroneously cited as 24 P. 2d 910 instead of 24 F. 2d 910.

A review of these two cases will, in the opinion of counsel for appellant, result in a reversal of the judgment of the lower court.

Dated, Anchorage, Alaska,
April 16, 1956.

GEORGE B. GRIGSBY,
Attorney for Appellant.

No. 14552

United States
Court of Appeals
For the Ninth Circuit.

BLAIR HOLDINGS CORPORATION, a Corporation;
BLAIR-ROLLINS & CO., INCORPORATED, a Corporation, and BLAIR & CO.,
INC., OF NEW YORK, a Corporation,

Appellants,

VS.

BAY CITY BANK AND TRUST COMPANY, a
Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

MAR 10 1955

PAUL P. O'BRIEN,

CLERK

No. 14552

United States
Court of Appeals
For the Ninth Circuit.

BLAIR HOLDINGS CORPORATION, a Corporation;
BLAIR-ROLLINS & CO., INCORPORATED, a Corporation, and BLAIR & CO.,
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Appellants,

VS.

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Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Northern District of California, Southern Division

No. 31082

DEAN WITTER, JEAN C. WITTER, GUY
WITTER, JOHN WITTER, PHELPS WIT-
TER, AUSTIN BROWN, EATON TAYLOR,
RICHARD W. KELLETT, RALPH E.
PHILLIPS, CHARLES H. CLAY, FRANK
F. WALKER, DEAN WITTER, JR.,
LLOYD C. STEVENS, HAROLD W. SCOTT,
WENDELL W. WITTER, EDWIN D. WIT-
TER, G. WILLARD MILLER, J. BRAD-
FORD CROW, JR., HERMAN H. MICH-
ELS, SHIRLEY HOUGHTON, TALBOT
P. KENDALL, PHILIP J. FITZGERALD,
BERTRAND J. FOLEY, DOUGLAS G.
ATKINSON, TOWNLEY W. BALE, WIL-
LIAM M. WITTER, FRANK T. McCOR-
MICK, Individually and as Partners in DEAN
WITTER & CO., a Copartnership,

Plaintiffs,

vs.

BLAIR HOLDINGS CORPORATION, a Corpo-
ration, BLAIR-ROLLINS & CO., INCORPO-
RATED, a Corporation, BLAIR & CO., INC.
OF NEW YORK, a Corporation, BAY CITY
BANK & TRUST CO., a Corporation, VIR-
GIL D. DARDI, PAUL RICE, E. J. CRO-
FOOT, PHILLIP BARNETT,

Defendants.

COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. This action is brought pursuant to the provisions of sections 1335 and 2361 of Title 28 of the United States Code and involves a controversy between citizens of different states, and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$500. Plaintiffs are suing as individuals and as members of a limited partnership known as Dean Witter & Co., having its principal place of business at No. 45 Montgomery Street, San Francisco, California, and having as general partners the following: Dean Witter, Jean C. Witter, Guy Witter, John Witter, Phelps Witter, Austin Brown, Eaton Taylor, Richard W. Kellett, Ralph E. Phillips, Charles H. Clay, Frank F. Walker, Dean Witter, Jr., Lloyd C. Stevens, Harold W. Scott, Wendell W. Witter, Edwin D. Witter, G. Willard Miller, J. Bradford Crow, Jr., Herman H. Michels, Shirley Houghton, Talbot P. Kendall, Philip J. Fitzgerald, Bertrand J. Foley, Douglas G. Atkinson, Townley W. Bale, William M. Witter and Frank T. McCormick; and as limited partners the following: Daniel G. Volkmann, William P. Roth and Clay H. Sorrick.

Plaintiffs have complied with the requirements of California Civil Code sections 2466 and 2468.

2. Defendant Blair Holdings Corporation is a corporation incorporated under the laws of the State of New York. Defendant Blair-Rollins & Co., Incorporated, is a corporation incorporated

under the laws of the State of Delaware. Defendant Blair & Co., Inc., of New York is a corporation incorporated under the laws of the State of California. Plaintiffs are informed and believe and therefore allege that defendant Bay City Bank & Trust Co. is a corporation incorporated under the laws of the State of Texas. Defendant Virgil D. Dardi is a resident of the City and County of San Francisco, State of California. Defendant Phillip Barnett is a resident of the City and County of San Francisco, State of California. Defendant E. J. Crofoot is a resident of the City of Sacramento, State of California. Plaintiffs are informed and believe and therefore allege that defendant Paul Rice is a resident of the City and County of San Francisco, State of California.

3. Plaintiffs will hereinafter be referred to collectively and as members of said partnership as plaintiff. Plaintiff is holding 2,000 shares of stock of Blair Holdings Corporation, a corporation, consisting of the following certificates: Nos. 6201 to 6216, inclusive, registered in the name of Dean Witter & Co., together with certificates Nos. SH-10652, S-13739, N-3931 and NH-1736, in street form, each certificate being for 100 shares. Said stock was received by plaintiff pursuant to certain escrow instructions contained in a letter to plaintiff dated May 26, 1950, signed by Phillip Barnett and Henry C. Clausen, which said letter incorporates by reference a stipulation executed in counterpart dated May 19, 1950. A true copy of said letter and stipu-

lation is attached hereto, and by reference incorporated herein and made a part hereof as Exhibit A. By the terms of said escrow instructions plaintiff is to hold said stock in escrow, "pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release." Plaintiff has never received the orders or order referred to in said escrow instructions.

4. On September 11, 1951, the sheriff of the City and County of San Francisco served upon plaintiff a purported writ of execution and notice of levy purporting to levy upon all moneys, credits, effects, debts, due or owing E. J. Crofoot. Said levy purported to be on behalf of Blair Holdings Corporation pursuant to a judgment purportedly entered in favor of Blair Holdings Corporation and against E. J. Crofoot in consolidated actions in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled, "E. J. Crofoot, Plaintiff, vs. Virgil Dardi, etc., et al., Defendants," No. 386971, and "Bay City Bank & Trust Co., a corporation, Plaintiff and Cross Defendant, vs. Blair Holdings Corporation, a corporation et al., Defendants, Cross Complainants and Cross Defendants," No. 383427.

5. On November 14, 1951, defendant Phillip Barnett wrote plaintiff a letter making claim to 1,600 shares of said stock purporting to do so (a) as attorney for and on behalf of Bay City Bank & Trust Co., a corporation, and (b) on his own

behalf. Said letter likewise stated that 400 shares of said stock had been furnished by Virgil D. Dardi, and that neither Bay City Bank & Trust Co. nor Phillip Barnett made any claim to said 400 shares.

6. On November 14, 1951, defendant Phillip Barnett purporting to act as the depositor of 1,600 shares of said stock requested that said stock be sold and the proceeds remitted to him personally.

7. Each of the defendants are claiming or may claim some right, title or interest in and to said stock. Said claims are conflicting and adverse as between defendants Blair Holdings Corporation and defendant Phillip Barnett, and as between defendant Blair Holdings Corporation and defendant Bay City Bank & Trust Co., and said claims may be adverse as between all or some of the remaining defendants. Plaintiff is ignorant of the respective rights of said defendants as among themselves and cannot without hazard to itself undertake to decide as to the validity of said conflicting claims or any thereof as among said defendants asserting same, and it is not proper that plaintiff be required to do so. Plaintiff disclaims any interest in said stock so held in escrow except to release and deliver said stock to whosoever is lawfully entitled thereto.

8. By reason of said conflicting claims plaintiff is in great doubt as to who among said defendants is entitled to all or any part of said stock, and plaintiff is in great danger of being harrassed and

damaged and cannot safely release and deliver said stock or recognize any of said claims without the aid of this court. Plaintiff has no plain, speedy or adequate remedy at law for determining said claims and has been obliged to employ attorneys for the purpose of prosecuting this suit and to incur obligation for attorneys' fees herein.

9. Contemporaneously with the filing of this complaint plaintiff has deposited said stock with the clerk of the above-entitled court. Said stock has a fair market value in excess of \$500.

Wherefore, plaintiff prays as follows that:

1. Defendants be decreed to interplead and settle among themselves their rights or claims with relation to said stock and with relation to said escrow instructions;

2. Plaintiff be released from all further liability on account of said stock and on account of said escrow instructions;

3. Plaintiff be allowed reasonable attorneys' fees and its costs as a condition precedent to the delivery to whosoever is entitled thereto of said stock which plaintiff has deposited with the clerk of this court and which is the subject of this proceeding;

4. Defendants and each of them be restrained pursuant to section 2361 of Title 28 of the United States Code from instituting or prosecuting any proceeding in any state or United States court affecting said stock, and specifically that defendant

Blair Holdings Corporation, a corporation, be enjoined from prosecuting any further proceedings by it pursuant to or in any way related to the purported writ of execution and notice of levy served upon plaintiff in those certain consolidated actions entitled, "E. J. Crofoot, Plaintiff, vs. Virgil Dardi, etc., et al., Defendants," No. 386971, and "Bay City Bank & Trust Co., a corporation, Plaintiff and Cross Defendant, vs. Blair Holdings Corporation, a corporation, et al., Defendants, Cross Complainants and Cross Defendants," No. 383427.

5. Such other relief be awarded by this court as may be proper in the premises.

Dated: This 5th day of December, 1951.

PILLSBURY, MADISON &
SUTRO,

/s/ MAURICE D. L. FULLER,

/s/ DONALD G. McNEIL,

Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

Law Offices
PHILLIP BARNETT
2810 Russ Building
San Francisco 4
GARfield 1-5108

May 26, 1950.

Dean Witter & Co.,
45 Montgomery Street,
San Francisco, California.

Attention: Mr. Cronin.

Re: Bay City Bank and Trust Company.

Gentlemen:

You are hereby instructed that you shall hold in escrow 2,000 shares of Blair Holdings Corporation stock at no expense to Blair Holdings Corporation, identified by certificate numbers 6201 to 6216, representing 100 shares each and certificates numbers SH 10652, S 13739, N 3931 and NH 1736, representing 100 shares each.

Said escrow is pursuant to that certain stipulation, copy of which is attached hereto, dated May 19, 1950, and which stipulation is in connection with litigation now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, Number 383427, involving Bay City Bank and Trust Company, a corporation, and Blair Holdings Corporation, a corporation.

You shall release these shares in accordance with the provisions contained in said stipulation.

Yours truly,

/s/ PHILLIP BARNETT,

BLAIR HOLDINGS
CORPORATION,

By /s/ HENRY C. CLAUSEN.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 383427

BAY CITY BANK AND TRUST COMPANY,
a Corporation,

Plaintiff,

vs.

BLAIR HOLDINGS CORPORATION, a Corpora-
tion, et al.,

Defendants.

STIPULATION

This stipulation is entered into this 19th day of May, 1950, between Bay City Bank and Trust Company, a corporation, referred to as Bay City, and Blair Holdings Corporation, a corporation, referred to as Blair, parties to the above litigation now pending and being presently heard before Mr. George Osborne, Arbitrator, pursuant to Arbitration Agreement dated March 6, 1950, between above

parties and others whose signatures hereto are necessary so as not to affect the terms and conditions of the aforesaid Arbitration Agreement in any particular except to effectuate the purpose and intent of this agreement.

1. Plaintiff Bay City hereby dismisses with prejudice the above-named action against Blair, Jean Lambert, Frank Reed and Virgil D. Dardi, among other things, to enforce the transfer of 20,000 shares of stock held by it as collateral and which transfer has already been effected upon the placing up of a bond.

2. Blair dismisses with prejudice its counter-claim and cross-complaint against Bay City on all causes of action in the action above against said Bay City but reserves and retains as against Crofoot and Rice and Crofoot or Rice all rights and remedies which Blair would otherwise have against Bay City or which may be asserted against Crofoot and Rice or Crofoot or Rice through said Bay City, as agreed to be arbitrated.

3. Blair and Bay City hereby release the other of them and their respective directors, officers, employees, agents and attorneys from any and all claims of every kind and character and description arising out of or incidental to the aforesaid litigation and any litigation now being arbitrated as aforesaid and any transaction described in said litigation and the matters therein set forth excepting as herein specifically reserved and otherwise provided for.

4. Blair stipulates that an order may be entered discharging that certain bond in Action 383427 in the principal amount of \$50,000.00 put up under order dated February 8, 1949, as ordered by Honorable Milton T. Sapiro, Judge of the Superior Court, requiring Bay City to indemnify Blair in the event that Blair and others, as stated in said order, shall be damaged by reason of the transfer of said stock, upon the condition that E. J. Crofoot in the aforesaid litigation agrees to guarantee and to indemnify Blair and does hereby guarantee and indemnify Blair and save and hold harmless Blair, up to the extent of \$15,000.00, its officers, transfer agents and register agents against any loss, damages or expenses or other liability by reason of the recordation or the transfer or the issuance of new certificates of shares as required by said order, and further agrees to escrow forthwith 2,000 shares of Blair stock in the place and stead of said bond, being the said 2,000 shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot of approximately \$35,000.00. Said 2,000 shares of stock shall be left in escrow in the possession of Dean Witter & Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release.

5. Nothing in this agreement or stipulation shall in any way alter or amend in any respect the terms or conditions of that written Arbitration Agreement between other parties hereinabove referred to

except as herein stated, and E. J. Crofoot and Blair each reserves the right to assert against the other all claims for costs and expenses incurred herein and to which Bay City or Blair may be entitled as a result of the action between these parties in this agreement and the Arbitrator shall award to Blair or Crofoot, respectively, such damages incurred by Blair or Bay City (through Crofoot) in their action against the other as may have been heretofore provided by said Arbitration Agreement, and Bay City shall be considered withdrawn from said arbitration.

In witness whereof, each of the parties hereto have signed their name this 19th day of May, 1950.

Parties to the Agreement:

BLAIR HOLDINGS
CORPORATION,

By.....

BAY CITY BANK AND
TRUST COMPANY,

By /s/ P. R. HOMILL,
President.

I agree to Guarantee as Provided in Paragraph 4.

/s/ E. J. CROFOOT.

We, the undersigned, parties to the Arbitration Agreement dated March 6, 1950, hereby consent and agree that the Arbitration now being heard by Mr. George Osborne, pursuant to that written Ar-

bitration Agreement dated the 6th day of March, 1950, shall continue in any and all respects as between us, and the aforesaid mutual releases and stipulation herein contained, shall not affect, alter, modify or in any way change the terms and conditions of said Arbitration Agreement, except as provided above. We hereby consent and agree that said Arbitration shall continue in full force and effect.

BLAIR HOLDINGS
CORPORATION,

New York City, New York,

By

BLAIR-ROLLINS & CO.,
INCORPORATED,

Russ Building, San Francisco,

By

BLAIR & CO., INC., OF
NEW YORK,

Russ Building, San Francisco,

By

BAY CITY BANK AND
TRUST COMPANY,

c/o Phillip Barnett, Russ Bldg., San Francisco,
California,

By /s/ P. R. HOMILL,
Pres.;

/s/ E. J. CROFOOT,

/s/ PAUL RICE.

.....
.....
.....
.....

Directors.

Approved by Counsel:

/s/ PHILLIP BARNETT.

.....
KEESLING & KEESLING,
HENRY L. CLAUSEN.

Two photostatic copies of the foregoing stipulation appeared in the original record. They are identical with the exception of the signatures. The foregoing printed signatures appeared on one copy. This is a photostat of the signatures appearing on the other copy.]

BLAIR HOLDINGS CORPORATION
New York City, New York

By *[Signature]*

BLAIR-ROLLINS & CO., INCORPORATED
Russ Building, San Francisco

By *J. M. Whitbeck*

BLAIR & CO., INC. OF NEW YORK
Russ Building, San Francisco

By *J. M. Whitbeck*

RAY CITY BANK AND TRUST COMPANY
c/o Phillip Barnett, Russ Bldg.,
San Francisco, California

By _____

W. J. Crofoot

Paul Rice

DIRECTORS

Endorsed: Filed December 5, 1951.

[Title of District Court and Cause.]

DISCLAIMER

Comes now defendant Paul Rice and disclaims any right, title or interest in the subject matter set forth in plaintiff's complaint on file herein.

Dated: January 21, 1952.

/s/ PAUL H. RICE.

/s/ ROGER ANDERSON,

Attorney for Defendant Paul
Rice.

[Endorsed]: Filed January 22, 1952.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Bay City Bank & Trust Company, a corporation, and Phillip Barnett, and answer the complaint on file herein as follows:

I.

These answering defendants having no information or belief upon the subjects mentioned in Paragraph I of plaintiff's complaint sufficient to enable them to answer any of the allegations therein contained, and placing their denial on that ground deny each and every allegation set forth in said Paragraph 1 except the allegations that the controversy is between citizens of different states and

that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$500.00.

II.

These answering defendants having no information or belief upon the subjects mentioned in Paragraph 2 of plaintiff's complaint sufficient to enable them to answer any of the allegations therein contained, and placing their denial on that ground, deny each and every allegation set forth in said Paragraph 2, except the allegations that Bay City Bank & Trust Company is a Texas corporation and that Phillip Barnett is a resident of the City and County of San Francisco, State of California.

III.

These answering defendants admit the allegations of Paragraph 3 of plaintiff's complaint and further state that on October 24, 1951, Phillip Barnett, attorney for E. J. Crofoot, signed a written order releasing said stock. That said stock was originally placed in escrow as part of a transaction which eliminated the Bay City Bank & Trust Company from an arbitration proceeding and streamlined the action down to the principals. That said stock was placed in escrow in lieu of a bond and to save the premium thereon. That when the arbitrator made his award, the purpose of said escrow ceased. That, however, the Arbitrator neglected to make any order in regard to said stock, and that Blair Holdings Corporation has arbitrarily refused to sign a release of said stock which release has been demanded by these defendants.

IV.

These answering defendants having no information or belief upon the subjects mentioned in Paragraph 4 of plaintiff's complaint sufficient to enable them to answer any of the allegations therein contained, and placing their denial on that ground, deny each and every allegation set forth in said Paragraph 4.

V.

These answering defendants admit the allegations of Paragraphs 5 and 6 of plaintiff's complaint.

VI.

These answering defendants having no information or belief upon the subjects mentioned in Paragraph 7 of plaintiffs' complaint sufficient to enable them to answer any of the allegations therein contained, and placing their denial on that ground, deny each and every allegation set forth in said Paragraph 7, and further state that 1600 of the said 2000 shares is part of a block of 20,000 shares held by Dean Witter in the name of Bay City Bank & Trust Company and subject to the direction of Phillip Barnett. Said 1600 shares are the property of Phillip Barnett, individually, and of Phillip Barnett as attorney for and on behalf of Bay City Bank & Trust Company, a corporation. That the interest and ownership of Phillip Barnett and Bay City Bank & Trust Company, a corporation, in said stock are the same and not in conflict. Neither Bay City Bank & Trust Company, a corporation, nor Phillip Barnett make any claim in or to the remaining 400 shares.

VII.

These answering defendants having no information or belief upon the subjects mentioned in Paragraphs 8 and 9 of plaintiffs' complaint sufficient to enable them to answer any of the allegations therein contained, and placing their denial on that ground, deny each and every allegation set forth in said Paragraphs 8 and 9 except that the stock has a fair market value in excess of \$500.00.

Wherefore, these answering defendants pray as follows:

1. Defendants Bay City Bank & Trust Company, a corporation, and Phillip Barnett be decreed the owners in fee of 1600 shares of said stock;

2. That said 1600 shares be released to Bay City Bank & Trust Company, a corporation, and Phillip Barnett.

3. Defendant Bay City Bank & Trust Company, a corporation, and Phillip Barnett be released from all further liability on account of said stock and on account of said escrow instructions.

4. Such other relief be awarded by this Court as may be proper in the premises.

/s/ PHILLIP BARNETT.

/s/ RODNEY H. ROBERTSON,
Attorney for Defendants, Bay City Bank & Trust
Company, a Corporation, and Phillip Barnett.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant E. J. Crofoot and answers the complaint on file herein as follows:

I.

This answering defendant having no information or belief upon the subjects mentioned in Paragraphs I, III, IV, V, VI, VIII and IX of plaintiffs' complaint sufficient to enable him to answer any of the allegations therein contained, and placing his denial on that ground denies each and every allegation set forth in said Paragraphs I, III, IV, V, VI, VIII and IX.

II.

This answering defendant having no information or belief upon the subjects mentioned in Paragraph II of plaintiffs' complaint sufficient to enable him to answer any of the allegations therein contained, and placing his denial on that ground, denies each and every allegation set forth in said Paragraph II, except the allegation that E. J. Crofoot is a resident of the City of Sacramento, State of California.

III.

This answering defendant having no information or belief upon the subjects mentioned in Paragraph VII of plaintiffs' complaint sufficient to enable him to answer any of the allegations therein contained, and placing his denial on that ground, denies each and every allegation set forth in said Paragraph

VII, and defendant E. J. Crofoot further states that he claims no right, title or interest in or to any of said 2,000 shares of Blair Holdings Corporation stock presently held by Dean Witter & Co. for the account of Bay City Bank and Trust Company, and that a letter to this effect was addressed to plaintiff on November 27, 1951.

Wherefore defendant E. J. Crofoot prays as follows that:

1. All proceedings in the above-entitled action be abated and that he recover his costs herein.
2. He be released from all liability on account of said stock and on account of said escrow instructions.
3. Such other relief be awarded by this Court as may be proper in the premises.

/s/ PHILLIP BARNETT,
Attorney for E. J. Crofoot.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS BLAIR HOLDINGS CORPORATION, A CORPORATION; BLAIR-ROLLINS & CO., INC., A CORPORATION; BLAIR & CO., INC., OF NEW YORK, A CORPORATION, AND VIRGIL D. DARDI

Defendants Blair Holdings Corporation, a corporation; Blair-Rollins & Co., Inc., a corporation; Blair & Co., Inc., of New York, a corporation, and Virgil D. Dardi, answer the complaint on file herein as follows:

I.

These answering defendants have no information or belief upon the subjects mentioned in paragraph I of plaintiffs' complaint sufficient to enable them to answer the allegations contained therein, and placing their denial upon that ground, deny all the allegations set forth in said paragraph, except the allegation that the controversy is between citizens of different states, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$500.00.

II.

Admit the allegations of paragraphs II, III and IV, and allege that in the arbitration proceedings referred to therein, the arbitrator, Professor George E. Osborne of Stanford University, made an award which was thereafter corrected and confirmed by the Superior Court of the State of California, in and for the City and County of San Francisco, a copy of which

said Order is attached as Exhibit "B" to Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss herein, and is thus referred to and incorporated herein, and thereafter there was entered in the said Superior Court of the State of California, a judgment on said corrected award of arbitrator, a copy of which is attached to said Memorandum of Points and Authorities as Exhibit "A," and thereby referred to and made a part thereof, and thereafter on or about September 11, 1951, the said Blair Holdings Corporation, a corporation, caused a writ of execution on said judgment to issue, a copy of which is attached hereto, and made a part hereof, and the Sheriff of the said City and County of San Francisco, State of California, duly served and levied upon plaintiffs and upon the said stock referred to in plaintiffs' complaint comprising said 2,000 shares of Blair Holdings Corporation, a corporation, and upon said Blair Holdings Corporation, a corporation, the said writ of execution and notice of levy in the said consolidated actions which have theretofore been arbitrated.

III

These answering defendants have no information or belief on the subjects mentioned in paragraphs V and VI of plaintiffs' complaint sufficient to enable them to answer any of the allegations contained therein, and placing their denial upon that ground, deny all the allegations set forth in said paragraphs. Said defendants further allege that neither defendants Bay City Bank & Trust Co., a corporation, nor Phillip Barnett, nor Virgil D. Dardi, nor any person

or firm other than Blair Holdings Corporation, a corporation, are the owners of or entitled to possession of the said 2,000 shares of said stock.

IV

These answering defendants have no information or belief on the subjects mentioned in paragraphs VII, VIII and IX sufficient to enable them to answer any of the allegations contained therein and placing their denial upon that ground, deny all the allegations set forth in said paragraphs, except that defendant Blair Holdings Corporation, a corporation, is the owner and entitled to possession of said 2,000 shares of stock, and all right, title and interest in and to said stock, which has a fair market value in excess of \$500.00, and that said ownership and right to possession thereof by said Blair Holdings Corporation, a corporation, is based among other things upon (1) Exhibit "A" to plaintiffs' complaint, being a letter of instructions to plaintiffs of May 26, 1950, and the stipulation of the parties; (2) the award of said arbitrator in favor of said Blair Holdings Corporation, a corporation; (3) the order correcting and confirming the said award of the arbitrator; (4) the judgment of the corrected award of arbitrator, and (5) the execution caused to be levied by Blair Holdings Corporation, a corporation, on said judgment; and for each of said reasons.

Wherefore, defendants Blair-Rollins & Co., Inc., a corporation; Blair & Co., Inc., of New York, a corporation, and Virgil D. Dardi pray that they be hence dismissed from this action with their costs, and

that defendant Blair Holdings Corporation, a corporation, be decreed the owner in fee of said 2,000 shares of said stock, and entitled to the possession of the certificates therefor, and the holder of a lien thereon by virtue of said levy of execution, and for such other and further relief as may be meet and proper in the premises.

KEESLING & KEESLING,

HENRY C. CLAUSEN,

/s/ HENRY C. CLAUSEN,

Attorneys for Said Answering
Defendants.

Duly verified.

In the Superior Court of the State of California, in
and for the City and County of San Francisco

No. 386971

E. J. CROFOOT,

Plaintiff,

vs.

VIRGIL DARDI, etc., et al.,

Defendants.

No. 383427

BAY CITY BANK AND TRUST COMPANY, a
Corporation,

Plaintiff and Cross-Defendant,

vs.

BLAIR HOLDINGS CORPORATION, a Corpora-
tion,

Defendant, Cross-Complainant
and Cross-Defendant;

JEAN LAMBERT, etc., et al.,

Defendants;

PAUL RICE, etc., et al.,

Cross-Defendants;

E. J. CROFOOT,

Cross-Complainant.

No. 382342

PAUL RICE,

Plaintiff.

vs.

BLAIR HOLDING CO., etc., et al.,

Defendants.

No. 383091

PAUL RICE,

Plaintiff,

vs.

BLAIR HOLDINGS CORPORATION, etc., et al.,

Defendants.

Supreme Court of the State of New York,
County of New York

Index No. 13-1949

BLAIR HOLDINGS CORPORATION,

Plaintiff,

against

E. J. CROFOOT,

Defendant.

Index No. 78-1949

E. J. CROFOOT,

Plaintiff,

against

L. MARIO GIANNINI, etc., et al.,

Defendants.

EXECUTION

In the Superior Court of the State of California, in
and for the City and County of San Francisco

No.

.....

Plaintiff,

vs.

.....

Defendant.

The People of the State of California, to the Sheriff
of the City and County of San Francisco, Greet-
ing:

Whereas, on the 5th day of July, A. D. 1951, a judg-
ment was rendered by the above-entitled court in the
above-entitled action in favor of Blair Holdings Cor-
poration, as judgment creditor, and against E. J. Cro-
foot, as judgment debtor, and said judgment was duly
entered in Volume 892, page 6, for the sum of

\$174,421.42, principal,

\$.....attorney fees,

\$.....interest, and

\$.....costs, making a total amount of the
judgment as

\$.....entered, and

Whereas, according to a cost bill after judgment
filed herein, it appears that further sums have ac-
crued since the entry of judgment, to wit:

\$.....accrued interest, and

\$.....accrued costs, making a total of

\$.....due on said judgment before deductions,

on which total amount credit must be given for payments and partial satisfactions in the amount of

\$105.15, leaving a net balance of

\$174,316.27 actually due on said judgment on the date of the issuance of this execution, to which must be added the costs and commissions of the officer executing this writ.

.....

These Presents Are Therefore to Command You to satisfy the said judgment with interest and costs as provided by law and your costs and disbursements out of the personal property of said debtor, and if sufficient personal property can not be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the abstract of judgment was filed as provided in Section 674 of this code, or at any time thereafter, and make return of this writ within 60 days after your receipt thereof, with what you have done endorsed hereon.

Given under my hand and the Seal of the Superior Court of the State of California, in and for the City and County of San Francisco.

Dated September 11, 1951.

[Seal] MARTIN MONGAN.
 Clerk.

By J. FITZPATRICK,
 Deputy Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed May 22, 1952.

[Title of District Court and Cause.]

No. 31082

ORDER FOR ENTRY OF JUDGMENT

It Is Ordered that judgment be entered herein upon findings of fact and conclusions of law in favor of Bay City Bank & Trust Company and Phillip Barnett, and against Blair Holdings Corporation, et al., declaring Bay City Bank & Trust Company to be owners in fee of the 1600 shares of stock, and releasing the said shares to Bay City Bank & Trust Company and Phillip Barnett.

The respective parties to pay their own costs.

Dated: July 13th, 1954.

/s/ MICHAEL J. ROCHE,
 U. S. District Court Judge.

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 9th day of June, 1954, before the Court sitting without a jury, Rodney H. Robertson, Esq., having appeared as counsel for the defendants Bay City Bank & Trust Company and Phillip Barnett, and Henry C. Clausen, Esq., having appeared as counsel for the defendants Blair Holdings Corporation, Blair-Rollins & Co., Incorporated, and Blair & Co., Inc., and the defendant, E. J. Crofoot, having appeared by his Answer filed on January 25, 1952, and disclaimed any interest in and to the stock which is the subject matter of this action, and the defendant, Virgil Dardi, having appeared by Answer filed May 22, 1952, and did thereby deny any interest in and to the said stock which is the subject matter of this suit, and the defendant, Paul Rice, having failed to appear herein, and this Court having heretofore entered its Judgment of Interpleader on or about the 15th day of January, 1953, whereby the said 2,000 shares of stock were deposited into Court by plaintiffs and whereby plaintiffs were awarded \$500.00 attorney's fee and \$62.00 costs which said attorney's fee and costs were charged as a lien upon said stock certificates so deposited in Court and which lien is to be discharged by the prevailing party, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for

decision, and the Court being fully advised in the premises, now makes its findings of fact as follows:

Findings of Fact

1. That on or about May 26, 1950, 2000 shares of Blair Holdings Corporation stock were escrowed with the plaintiffs pursuant to a letter dated May 26, 1950, and stipulation dated May 19, 1950, which documents are attached to plaintiffs' complaint and marked Exhibit "A."

2. That the said 2,000 shares of stock were deposited in Court by plaintiffs on or about January 15, 1953, pursuant to a Judgment of Interpleader and attorney fees and costs are provided to be paid to plaintiffs and a lien is charged upon said stock which must be satisfied by the prevailing party upon determination of the suit.

3. That of the 2,000 shares of stock so deposited in Court, 400 shares are represented by Certificates Numbers SH 10652, S 13739, N 3931 and NH 1736, each of said certificates being for 100 shares and 1600 shares are represented by certificates numbers 6201 to 6216 in the amount of 100 shares each.

4. That defendants Bay City Bank and Trust Company, hereinafter called Bay City Bank, Philip Barnett and Virgil Dardi disclaim any right, title and interest in and to the said 400 shares represented by certificates numbers SH 10652, S 13739, N 3931 and NH 1736. The Court finds that

it is a fact that said 400 shares are the property of Blair Holdings Corporation.

5. That the aforesaid 1600 shares of stock, bearing certificates numbers 6201 to 6216 are executed in the "street name" of Dean Witter & Co., and held by said company for the account of Bay City Bank, subject to the order of Phillip Barnett.

6. That on or about March 15, 1949, the Bay City Bank, through its attorney, Phillip Barnett, deposited 20,000 shares of Blair Holdings Corporation Stock, standing in the name of Bay City Bank, with Dean Witter & Co. That from and after March 15, 1949, to on or about May, 1950, defendant Phillip Barnett ordered the sales of 18,400 shares of said stock and the proceeds from those sales of said stock were delivered to Bay City Bank. There remained in Dean Witter & Co., for the account of Bay City Bank, some 1600 shares unsold and subject to the order of Phillip Barnett.

7. During the period 1949 to 1953, certain litigation was pending among the parties defendant. That litigation was reduced to arbitration proceedings had before George Osborne, Arbitrator, during the period April, May and June, 1950. In one of these actions, the defendant, Bay City Bank, was required to post a conversion surety bond in order to secure the transfer of certain stock. The premium on this bond was in excess of \$1,000 annually. In May, 1950, during the aforesaid arbitration proceedings, and for the purpose of effecting

a savings on the said surety bond premium, the parties created the escrow described in the letter and stipulations attached to the complaint and marked Exhibit "A." Pursuant to said escrow, 2,000 shares of Blair stock was to be placed with Dean Witter & Co., in lieu of the surety bond and that upon termination of the then pending litigation, the said stock was to be released either by the joint order of the parties or by award of the arbitrator.

8. That Bay City Bank and Phillip Barnett permitted the aforesaid 1600 shares (which was being held for their account and order at Dean Witter & Co.) to remain on deposit with Dean Witter to serve in lieu of the conversion bond above mentioned. That Virgil Dardi and/or Blair Holdings Corp. deposited 400 shares of stock with Dean Witter in order that there would be 2,000 shares on deposit. That neither Bay City Bank nor Phillip Barnett executed any assignment endorsement or other instrument for the purpose of transferring title to said 1600 shares of stock, and it was not intended by Bay City Bank, Phillip Barnett nor the Blair Parties that title to said stock should be transferred at the time said stock was escrowed.

9. That the Arbitrator did not, in his award, dispose of or otherwise release said 2,000 shares of stock held by Dean Witter. That Bay City Bank, by and through its attorney, Phillip Barnett, sought to secure the release of its 1600 shares of stock on several occasions, following entry of the

Arbitrator's award. Blair Holdings Corporation refused, however, to execute a joint order for the release of said stock.

10. It is a fact that from March 5, 1949 (the date Bay City Bank acquired title to the 20,000 shares of Blair stock as hereinabove stated), to the present time, title to the said 1600 shares of stock on deposit with Dean Witter & Co. has never been transferred by Bay City Bank or Phillip Barnett and that the said Dean Witter & Co. held said 1600 shares of stock at all times for the account of Bay City Bank.

From the foregoing facts, the Court concludes

Conclusions of Law

1. That Bay City Bank and Trust Company is the owner in fee of 1600 shares of Blair Holdings Corporation stock deposited in Court by plaintiffs pursuant to Judgment of Interpleader entered January 15, 1953.

2. That the aforesaid 1600 shares of stock should be released to Bay City Bank and Trust Company and its attorney, Phillip Barnett.

3. That the said Bay City Bank and Phillip Barnett pay to plaintiffs the sum of \$449.60, being 80% of the attorney's fee and costs awarded plaintiffs by the said Judgment of Interpleader.

4. That the Blair Parties hereto, as more specifically designated hereinabove, are the owners in

fee of 400 shares of Blair Holdings Corporation stock deposited in Court by plaintiffs pursuant to Judgment of Interpleader entered January 15, 1953.

5. That the said Blair Parties pay to plaintiffs the sum of \$112.40, being 20% of the attorney's fee and costs awarded plaintiffs by the said Judgment of Interpleader.

6. Other than as above indicated, the respective parties are to pay their own costs.

Let Judgment be entered accordingly.

Dated this 26th day of August, 1954.

/s/ MICHAEL J. ROCHE,

Judge of the U. S. District
Court.

Lodged July 26, 1954.

[Endorsed]: Filed August 25, 1954.

In the District Court of the United States, for
the Northern District of California, Southern
Division

No. 31082

DEAN WITTER, et al.,

Plaintiffs,

vs.

BLAIR HOLDINGS CORPORATION, a Corpora-
tion; BLAIR-ROLLINS & CO., INCORPO-
RATED, a Corporation; BLAIR & CO., INC.,
OF NEW YORK, a Corporation; BAY CITY
BANK & TRUST CO., a Corporation; VIRGIL
D. DARDI, PAUL RICE, E. J. CROFOOT,
PHILLIP BARNETT,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on the 9th day of June, 1954, before the Honorable Michael J. Roche, United States District Judge, sitting without a jury, Rodney H. Robertson, Esq., having appeared as counsel for the defendants Bay City Bank & Trust Company and Phillip Barnett, and Henry C. Clausen, Esq., having appeared as counsel for defendants, Blair Holdings Corporation, Blair-Rollins & Co., Incorporated, and Blair & Co., Inc., and the defendant E. J. Crofoot having appeared by his answer filed herein on or about January 25, 1952, and having thereby disclaimed any interest in and to the stock which is the subject matter of this action, and the defendant

Virgil Dardi, having appeared by his answer filed on or about May 22, 1952, and did thereby deny any interest in and to said stock which is the subject matter of this suit, and the defendant, Paul Rice, having failed to appear herein, and this Court having heretofore entered its Judgment of Interpleader on or about the 15th day of January, 1953, whereby the said 2,000 shares of stock were deposited into Court by plaintiffs, and the Court having heard the testimony and having examined the proofs offered by the respective defendants hereto, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, and having signed its written findings of fact and conclusions of law.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the Bay City Bank and Trust Company is hereby declared to be the owner in fee of 1600 shares of Blair Holdings Corporation stock now on deposit in the above-entitled Court pursuant to that certain decree of Interpleader entered by the above-entitled Court on or about January 15, 1953, and that the said 1600 shares of stock be and the same shall be released to the Bay City Bank and Trust Company and to its attorney, Phillip Barnett, upon but not until payment to plaintiff of the sum specified in paragraph 2 below.

2. That the said Bay City Bank and Trust Company or Phillip Barnett pay to plaintiffs the sum of \$449.60, being 80% of the attorney's fee and

costs awarded plaintiffs by the aforesaid Judgment of Interpleader.

3. That Blair Holdings Corporation be and it is hereby adjudged the owner in fee of 400 shares of Blair Holdings Corporation stock deposited in the above-entitled Court by plaintiffs pursuant to Judgment of Interpleader entered in the above-entitled action on or about January 15, 1953, and that the aforesaid 400 shares of stock be, and the same shall be released to the said Blair Holdings Corporation upon but not until payment to plaintiff of the sum specified in paragraph 4 below.

4. That the said Blair Holdings Corporation pay to the plaintiffs herein the sum of \$112.40, being 20% of the attorney's fee and costs awarded plaintiffs by the said Judgment of Interpleader.

5. That except as hereinabove specified, each of the parties hereto are to pay and bear their own costs of suit incurred herein.

Dated this 25th day of July, 1954.

/s/ MICHAEL J. ROCHE,

Judge of the U. S. District
Court.

Lodged July 26, 1954.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Blair Holdings Corporation, a corporation; Blair-Rollins & Co., Incorporated, a corporation, and Blair & Co., Inc., of New York, a corporation, defendants in the above-entitled action, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 26th day of August, 1954.

Dated: September 3, 1954.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Appellants.

[Endorsed]: Filed September 8, 1954.

The United States District Court, Northern
District of California, Southern Division

No. 31082

DEAN WITTER, et. al.,

Plaintiffs,

vs.

BLAIR HOLDINGS CORPORATION, a Corpo-
ration, et al.,

Defendants.

PROCEEDINGS

Wednesday, June 9, 1954

Appearances:

For Defendants, Blair Holdings Corporation, et al.,
and Virgil D. Dardi:

KEESLING & KEESLING, and
HENRY C. CLAUSEN, by
HENRY C. CLAUSEN, ESQ.

For Defendants, Bay City Bank & Trust Company,
and Phillip Barnett:

PHILLIP BARNETT, by
RODNEY H. ROBERTSON, ESQ.

* * *

WILLIAM B. DOYLE

was called as a witness by defendant Blair Holdings Corporation, who being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Court: Your full name, please?

A. William B. Doyle.

Q. What is your business or occupation?

A. I am office manager of Dean Witter and Company in San Francisco.

Q. How long have you been so engaged?

A. For 14 years.

Q. What is the nature of your work, supervising?

A. Supervising the accounting and such departments, yes.

Direct Examination

By Mr. Clausen:

Q. Mr. Doyle, I show you what purports to be a letter from the two attorneys, Phillip Barnett and myself, Henry C. Clausen, dated May 26, 1950, directed to Dean Witter and Company.

A. May 26. [15*]

Q. Yes, and would you see whether, from your own files, you have the original of that, please?

A. I have that letter, yes.

Mr. Clausen: May the record show that the witness hands me the original of the letter, dated May

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William B. Doyle.)

26, and I will introduce, Your Honor, this in evidence as the Blair Exhibit No. 1. [16]

The Court: The letter will be admitted and marked. Got a copy?

Mr. Robertson: I might say, Your Honor, that letter is attached as an exhibit in Plaintiff's complaint in interpleader.

The Court: Very well.

Mr. Robertson: Following is the stipulation.

The Clerk: Defendant's Exhibit 1-B admitted and filed in evidence.

(Whereupon letter referred to and identified above was received in evidence and marked Defendant's Exhibit 1-B.) [17]

* * *

Q. (By Mr. Clausen): Mr. Doyle, do you have the stipulation referred to in this letter, the stipulation being dated May 19, 1950?

A. I do not, no.

Q. I will show you, Mr. Doyle, and ask you if you can tell us—

All right, we may be able to stipulate to some of this. I will introduce that in evidence, Your Honor. [18]

I have photostatic copies here of the originals, and the reason there are two, your Honor, is because one was signed by some of the parties and one was signed by the other, but I will put the two in as one exhibit.

Mr. Robertson: Those are the stipulations, Coun-

(Testimony of William B. Doyle.)

sel, which are submitted on May 26, 1950. I will stipulate that they were delivered to Dean Witter at the time this escrow was obtained.

Mr. Clausen: Thank you.

The Court: The record will so show.

The Clerk: 2-B admitted and filed in evidence.

(Whereupon photostatic copies of stipulations referred to and more particularly identified above were received and marked in evidence as Defendant's Exhibit 2-B.) [19]

* * *

Mr. Robertson: You stipulate, Counsel, that agreement—stipulation was entered into while the Arbitration proceedings was commencing here in San Francisco?

Mr. Clausen: It was during the course of the Arbitration [23] as I stated this morning to Judge Roche.

Mr. Robertson: Yes.

Q. (By Mr. Clausen): Mr. Doyle, I show you an original——

Mr. Robertson: Stipulate to that.

Q. (By Mr. Clausen): I show you an original letter, Mr. Doyle, of May 26, 1950, from Dean Witter & Co. to Mr. Phillip Barnett and Mr. Henry C. Clausen, signed apparently by a general partner, G. D. Cronin, ask you do you recognize the signature there?

Mr. Robertson: Stipulate we received such a letter.

(Testimony of William B. Doyle.)

The Clerk: Defendant's Exhibit 4-B admitted and filed in evidence.

(Whereupon Stock Certificates referred to and more particularly described above were received in evidence and marked Defendant's Exhibit 4-B.)

Mr. Robertson: I have no objection to that. I will stipulate.

Q. (By Mr. Clausen): Mr. Doyle, just for the record, on the 11th day of September, 1951, did you have a Louis J. Stack, a Mr. Stack employed in your firm?

A. He was so employed at that time, that is correct.

Q. Is that his signature?

A. That is his signature, yes.

Mr. Clausen: We will introduce this in evidence, if the Court please, as one of the links on the execution phase. It is an answer to the garnishment and execution that was levied September 11, 1951.

The Court: Be admitted and marked next in order.

The Clerk: Defendant's Exhibit 5-B admitted and filed in evidence.

(Whereupon document entitled Answer [27] to Garnishment, referred to above, was received in evidence and marked Defendant's Exhibit No. 5-B.)

Mr. Robertson: That is the execution form, writ

(Testimony of William B. Doyle.)

of execution by Dean Witter, showing no account of E. J. Crofoot with them. Is that the one? What is that language at the bottom there? "No record of account."

The Court: Indicate for the record what this document is so there is no question about it.

Mr. Clausen: The document itself, your Honor, states on there, it is a Sheriff's Writ by Dean Witter, and states on there "no record of account," and it is signed by Dean Witter and Company by this man, Stack.

The Court: Very well.

Mr. Clausen: You may take the witness.

Cross-Examination

By Mr. Robertson:

Q. Mr. Doyle, do your records which you have with you indicate that you have an account number there, No. 5000 20256 1-32?

A. Yes, we—we would have such an account on our books.

Q. And what was the subject matter of that account?

A. It was opened for the Bay City Bank and Trust Company for the purpose of selling Blair stock, Blair Holdings Corporation stock. [28]

Q. I will show you a non-negotiable issue due bill, under the heading of Dean Witter and Company, S.F. 8987, stating, account No. 5000 20256, and ask you what that document is, please?

Mr. Clausen: We object to that, your Honor,

(Testimony of William B. Doyle.)

Q. On what date was that received?

A. The date is May 26, 1950.

Q. And would you read, please, the source of that stock?

A. The stock—there is one hundred shares in the name of Charles Markes, two hundred shares in the name of Schwabacher and Company, 100 shares in the name of Gordon Graves and Company, all properly endorsed.

Q. And do you have any other receipts in your files showing receipts of any additional Blair Holdings Company stock on May 26, 1950, other than these four hundred shares?

A. Apparently, we do not.

Mr. Robertson: I will offer this Dean Witter receipt, SF 31942, as Barnett's Exhibit next in order.

The Court: Be admitted next in order.

The Clerk: Defendant's Exhibit B admitted and filed in [31] evidence.

(Whereupon Dean Witter Receipt, SF 31942, referred to and more particularly described above, was received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. Robertson): Mr. Doyle, do you have the balance of your records available now that were sent for? A. Yes.

Q. And I will show you what purports to be a ledger sheet of Dean Witter and Company under date of April 1, 1949, and specifying certain sales of Blair Holdings Corporation stock in which there

(Testimony of William B. Doyle.)

appears Account No. 5000 20256 1-32, and ask you what that is, please?

A. This is a photostatic copy of the Customer Ledger Sheet for Account 5000 covering the period from March 10, 1949, through March 16, 1949, and then an additional photostat of a dividend payment on two thousand shares of stock, Blair Holdings stock on February 15, 1950.

Q. Yes. And does that account number—whose account number is that?

A. The account number 5000, Bay City Bank.

Q. And that ledger sheet shows certain sales?

A. It shows sales totaling eighteen thousand shares of Blair Holdings stock, and a subsequent check payment on the balance of the eighteen thousand shares amounting to \$35,239.96. [32]

Mr. Robertson: The defendant Barnett will offer this as his next exhibit in order, your Honor.

Mr. Clausen: Your Honor, to that we will object, and so that our position is clear in respect of the objection, your Honor, it is this, not as my adversary stated our position is, not that we rest our case upon any execution at all. We rest our case on the execution in part; we rest primarily upon the very words in the stipulation, and our position is that the sixteen hundred or the four hundred or the source makes no difference, because by the written document signed by the parties, it is here stated that Crofoot agrees to escrow forthwith, two thousand shares of Blair stock in the place and stead of said bond, and then, being the said two thousand

(Testimony of William B. Doyle.)

shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot of approximately \$35,000. And, therefore, our position is that since the Bay City signs this very paper and since Barnett signs the very paper, that it now disavows these words and say that Crofoot did not have two thousand shares of stock so far as Blair is concerned. That is our position, your Honor.

Mr. Robertson: That language, your Honor, does not necessarily mean that the title to said stock is in Crofoot, nor does it necessarily mean—it wasn't put into that escrow by Crofoot, it was already there, and we are putting this evidence in to trace the actual title to that stock through [33] Bay City Bank and Mr. Barnett and to explain any such language of that stipulation.

I asked Counsel if he would stipulate that the two thousand shares that was referred to in that stipulation were part and parcel of the sixteen hundred shares of the Bay City stock which was in escrow. Now, it is our contention, your Honor, that the original twenty thousand shares that were put in by Bay City always remained in their name and title, that it was sold down to the balance of sixteen hundred shares. This settlement proposition with respect to Bay City was suggested; a stipulation was drawn up and in lieu of this cash bond, these two thousand shares were escrowed. Now, the fact that they were escrowed pursuant to this agreement does not affect the title to the stock, and we are here disputing a question of the issue of title of that

(Testimony of William B. Doyle.)

stock. Blair claims they own the stock, we claim we own it. Now, that stock was substituted in escrow in lieu of this large cash bond that was costing \$1,000 a year. If the evidence develops, which it will, that that stock was loaned to Crofoot—if, for example, I was to put up my own real property bond to support an attachment of a third party, that doesn't necessarily mean the property I put up is the property of some third party, it is still my property. It so happened in this case, your Honor, that the Court found the Bay City stock and Crofoot stock was converted and there was no necessity for a further bond or for anything substituted [34] in lieu of a bond. Therefore, Blair was not damaged, they had no right to go after this bond or security in lieu of the bond.

The fact that the stipulation states that Crofoot will put up such and such can be controverted by the evidence to prove that what was already there was merely serving as security or a cash bond, and the title to that property is still in Bay City Bank and always has been, and Mr. Barnett. And that title to that stock is the issue here in dispute. Blair claims that all this stock——

The Court: I may ask you, Gentlemen, now what is before the Court?

Mr. Clausen: The objection, your Honor; what is before the Court, your Honor, is that he was offering, Counsel was offering in evidence this ledger sheet.

(Testimony of William B. Doyle.)

The Court: Indicate for the purpose of the record the purpose of this offer.

Mr. Robertson: The purpose of this offer, your Honor, is again to support the question of title to this stock.

The Court: For that limited purpose I will allow it in subject to your motion and over your objection.

Mr. Clausen: Your Honor, so I won't keep interrupting, because I see the witness has a sheaf of papers, may my objection, your Honor, as I stated, that it is irrelevant and immaterial to the issues, plus the fact, your Honor, it would be an attempt to violate and vary the terms of this written [35] instrument even to the point of constituting fraud on Blair, and I would ask your Honor if my objection on that phase would run to this line.

The Court: I wouldn't make that ruling, give you a better ruling. I will allow it subject to your motion to strike and over your objection.

Mr. Robertson: Thank you, your Honor.

The Court: So you will have a record on it.

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(Whereupon Ledger Sheet referred to and more particularly described at Page 32 of this record was received in evidence and marked Defendant's Exhibit C.)

Mr. Clausen: And I just wanted, your Honor, just one word more, if I may.

(Testimony of William B. Doyle.)

The Court: I will give you time to argue the case after you marshal your facts.

Mr. Clausen: All right, your Honor.

Q. (By Mr. Robertson): Mr. Doyle, your records indicate sixteen hundred shares of stock was a balance remaining from the original twenty thousand shares deposited with—made by Wells Fargo on behalf of Bay City Bank and Trust Company?

A. Our records show there were two thousand shares left in the account of the twenty thousand originally deposited with us. [36]

Q. Your records also indicate that four hundred shares was deposited in this particular escrow that was opened on May 26, 1950?

A. Yes, four hundred shares were received. I don't have a copy of it, but I have seen the receipt.

Q. Mr. Doyle, can you state that the sales, as demonstrated on this ledger sheet, Defendant Barnett's Exhibit C, were made during the period of March, 1949? A. That is correct.

Q. Do you know from your own knowledge who ordered the sales?

A. Mr. Phillip Barnett ordered the sales.

Q. And do you know where the proceeds of those sales were delivered?

A. The proceeds were delivered to the Wells Fargo Bank and Union Trust Company for the account of Bay City Bank and Trust Company.

Mr. Robertson: No further questions, Mr. Doyle, your Honor.

(Testimony of William B. Doyle.)

Mr. Clausen: Just one more, Mr. Doyle, please.

Redirect Examination

By Mr. Clausen:

Q. In answer to Counsel's question, Mr. Doyle, the statement was made that there had been a four hundred share sale recently. Now——

Mr. Robertson: Just a minute, I did not say recently, I [37] said at some time during the period March of 1949 to May 26, 1950, if a four hundred share sale was made.

Q. (By Mr. Clausen): Mr. Doyle, let me ask the question: Have any sales been made of the two thousand shares of stock represented here by these certificates, Defendant's Exhibit 4-B, being the two thousand shares referred to in the Dean Witter letter of May 26, 1950? Have any sales been made of that stock since that stock was deposited with you, Dean Witter and Company?

A. No sales have been made of these particular shares.

Q. When the four hundred share sale was made that you answered in respect to Mr. Robertson's question, that had nothing to do, did it, with the two thousand shares that are here in Court?

Mr. Robertson: We will stipulate it does not, Counsel.

Mr. Clausen: That is all.

Your Honor, please, may this witness be excused?

Mr. Robertson: We have no further need of him.

(Testimony of William B. Doyle.)

Mr. Clausen: I have no further questions at this time.

The Court: You wished to be excused?

The Witness: Very much. Thank you.

(Witness excused.)

The Court: Take a recess.

(Short recess.)

Mr. Robertson: May it please the Court, there was one [38] letter in the Dean Witter Company files which we neglected to have the witness, Doyle, identify, and perhaps, rather than recalling the witness, Counsel might be able to stipulate that was sent to Dean Witter. I have here a copy of the letter prepared by Counsel, Pillsbury, Madison and Sutro, Counsel for the plaintiff, which he sent, the letter from the Bay City Bank and Trust Company to Dean Witter. [38-A]

Mr. Clausen: Well, I would object to this under any circumstances, your Honor. It is apparently an opinion by the Bay City Bank as to one of the points that are now in issue before your Honor, hearsay. So far as the foundation is concerned, I would be very willing to consider, your Honor, that part of it, but even at that it is just a typewritten letter, it isn't a carbon, but it purports to be a letter from the Bay City Bank to Dean Witter stating that the 20,000 shares were assigned as collateral on an indebtedness and matters of that kind, which I would object to.

The Court: Is that the fact?

Mr. Clausen: I don't know, your Honor.

Mr. Robertson: That is the fact, your Honor.

Mr. Clausen: I don't know.

Mr. Robertson: The fact was, your Honor, that in 1951 Dean Witter wrote to all parties concerned, Blair, Mr. Barnett, Bay City Bank and Trust Company, and Crofoot, and asked them to state what their interest was in this stock, and this is a letter from the Bay City Bank to Dean Witter replying to Dean Witter's request, which letter was written before the institution of this suit.

The Court: Waive the foundation; I will allow it subject to your motion to strike and over your objections, so you will have a record.

Mr. Clausen: All right, your Honor. [39]

The Court: You may read it.

Mr. Robertson: Thank you, your Honor. The letter is a copy:

"Bay City Bank and Trust Co., Bay City, Texas

"November 14, 1951.

"Dean Witter and Company,

"45 Montgomery Street,

"San Francisco 6, Cal.

"Gentlemen:

"Referring to your letter of October 29th, please be advised 20,000 shares of Blair Holdings Corporation stock which were deposited with you by Mr. Phillip Barnett for our account, and on which there are presently outstanding 1,600 shares remaining,

were assigned to us as collateral for indebtedness of E. J. Crofoot, plus costs and ten per cent attorney fees, if necessary to employ an attorney in the collection thereof.

“Mr. Phillip Barnett is our San Francisco counsel and the matter has been placed in his hands. Please contact him for further information.

“/s/ P. R. HAMILL,
“President.”

Mr. Clausen: On my motion to strike, your Honor, I will reserve all objections except the foundation.

The Clerk: Defendant's Exhibit D in evidence.

(Whereupon letter referred to above was received in evidence and marked Defendants' Exhibit D.) [40]

Mr. Clausen: Call Mr. Dunn.

HOWARD E. DUNN

was called as a witness by the defendant, Blair, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Court: Your full name, please?

A. Howard E. Dunn.

Q. Your business or occupation?

A. With the Sheriff of the City and County of San Francisco, Chief Deputy.

(Testimony of Howard E. Dunn.)

Direct Examination

By Mr. Clausen:

Q. Mr. Dunn, did you, in response to a subpoena, appear here today and bring with you the file which shows some levies of execution in respect of the certain judgment that we are concerned with here?

A. Yes, I am here in response to a subpoena, yes.

Q. Is that the file, Mr. Dunn, showing levies on or about the 11th day of September, 1951, on Dean Witter and Company? A. Yes.

Mr. Robertson: May it please the Court, I think that Bay City can stipulate that a levy of execution was issued out of that action in the Superior Court of San Francisco County and served upon Dean Witter and Company and that subsequently [41] Dean Witter and Company, by the Blair exhibit, returned to the Sheriff, "No account of Crofoot in said Company."

Mr. Clausen: All right, we will pass that, accept that stipulation.

Q. Then, Mr. Dunn, does the record show a levy subsequently under that same judgment and execution on Blair Holdings Corporation?

A. Yes, in fact, two levies.

Q. And what dates?

A. November 28, 1951.

Q. And what other?

A. And February 13, 1952.

Q. Does the record there show the levy on No-

(Testimony of Howard E. Dunn.)

vember 28, 1951, as being on any shares of stock of E. J. Crofoot?

A. The levy was made for any and all shares, stocks or shares and interest in stocks or shares of Blair Holdings Corporation, a corporation.

Q. Belonging to? A. E. J. Crofoot.

Q. On whom was the levy made at Blair Holdings Corporation, Mr. Dunn?

A. N. H. Wendell, Jr., assistant secretary.

Q. May I have the papers on those processes, the November 28, 1951, and February 13, 1952, Mr. Dunn?

A. May I ask what papers you refer to? [42]

Q. Whatever papers that you referred to.

A. Well, I have our record cards here of the levy, and, of course, the original returns were returned to Court. Those were transcribed from the original returns of the Deputy and instructions, and the copy of letters.

Mr. Robertson: If it please the Court, we object. If counsel could advise what is the materiality of the levy and execution on the Blair Holdings Corporation—the issue in this case is the question of the title to some 2,000 shares of stock in the Dean Witter and Company.

Mr. Clausen: The point I thought I made clear this morning, and I was on the point of elaborating when your Honor said we should marshal the facts and then argue the case, but I will answer counsel *ex industria*. Your Honor, my point is we are entitled to this stock without any levy. We

(Testimony of Howard E. Dunn.)

didn't need any levy of execution at all, and entitled to the stock, your Honor, under the terms of the stipulation and, for example, on page 3, one short sentence:

“Said two thousand shares of stock shall be left in escrow in the possession of Dean Witter and Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator, directing said release.”

And we claim, your Honor, since Crofoot has disclaimed any interest in it and the other remaining party is Blair, that [43] Blair is entitled to the stock.

Moreover, we claim the stock on the additional ground of the very judgment itself, in the award which I haven't yet put in evidence, your Honor.

And the third ground that *ex industria*, as I said, we have had these levies made.

The Court: In any event, there is no question about these levies?

Mr. Robertson: Well, it appears, your Honor, that they are incompetent, irrelevant and immaterial insofar as the levy relates to a levy by Blair Holdings Corporation, an execution on themselves, I can't see the materiality of it. The only issue before your Honor today is the title, or the rights in and to the stock in Dean Witter and Company. That execution the witness has testified was made and we have stipulated pursuant to the order that a return was made by Dean Witter that Crofoot had no account with that company. Any levy of

(Testimony of Howard E. Dunn.)

execution on—by Blair Holdings Corporation—Blair Holdings Corporation I would object to as being incompetent, irrelevant and immaterial. We are not here litigating any issue of shares of Blair Holdings Corporation owned by Blair Holdings Corporation.

Mr. Clausen: Your Honor, it so happens in this case that Blair Holdings Corporation was the judgment creditor of some stock which, under that escrow, if there was any interest at [44] all in Cro-foot would be subject to execution. Now, our code tells us the manner in which execution shall be levied, and we followed that procedure. Therefore, I have here the process from the Sheriff taken from——

The Court: If there is any doubt about it I will allow it to go in over your objections.

Mr. Robertson: Subject to motion to strike?

The Court: Yes.

Mr. Robertson: Thank you.

Mr. Clausen: With respect to that, then we offer in evidence these various documents that I have just now obtained from Mr. Dunn, and I will ask Mr. Dunn——

The Court: So the record is clear, indicate for the purpose of the record the purpose of the offer of these levies.

Mr. Clausen: Yes, your Honor. As I said before, the purpose of the levy is to show that as an additional reason, as an additional reason, why, the stock should go to Blair rather than to these defendants. We levied executions and these executions

(Testimony of Howard E. Dunn.)

were on the specific stock, related to the specific stock of those shares that are referred to in the escrow. We certainly do not waive any rights or remedies under the stipulation, which is the basic document.

The Court: So you are not misled, I am unable to follow in relation to these levies going to the merits of this case. However, I will give you a record on it. Proceed. [45]

Mr. Clausen: Yes, your Honor. May I ask Mr. Dunn what he wants in reference to these documents. They are original papers. May we leave them here until this case is concluded?

The Witness: Whatever is the pleasure of the Court in the proceedings, I don't know.

The Court: With the understanding they will be returned to you and you will be responsible for them.

Mr. Clausen: On the conclusion of the case.

The Court: Any questions, counsel?

Mr. Robertson: I was going to stipulate I would have no objection to their being removed and photostats be substituted, subject to our original motion to strike them altogether.

The Court: I think that would be the better thing to do.

Mr. Clausen: All right. All right, Mr. Clerk, would you then return them to Mr. Dunn and Mr. Dunn, if you would have photostats made at my expense and sent to me I will give those to the Court instead.

(Testimony of Howard E. Dunn.)

The Court: So that you will have your original record.

The Witness: Yes, your Honor.

Mr. Clausen: That is all.

The Witness: That would be in both of these matters, sir?

Mr. Clausen: Thank you. May Mr. Dunn be excused, your Honor?

The Court: He may be excused.

(Witness excused.) [46]

Mr. Clausen: Mr. Adams, will you step forward, please?

HARRY S. ADAMS

was called as a witness on behalf of the defendant, Blair, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Court: Please state your full name.

The Witness: Harry S. Adams.

The Court: Your business or occupation?

A. Vice president and treasurer of Blair Holdings Corporation.

Q. Of what?

A. Vice president and treasurer of Blair Holdings Corporation.

Direct Examination

By Mr. Clausen:

Q. That is the corporation here in litigation, Mr. Adams?

A. It is.

(Testimony of Harry S. Adams.)

Q. And you held that position, Mr. Adams, for how long? A. Since April of 1952.

Q. And in regard to the time with which we are concerned you know that the corporate records show that in the year 1951, September, October, November, December, that N. H. Wendell was an assistant secretary of that same corporation?

A. He was.

Q. Now, that corporation had an office here during those [47] months and in that year, did it not?

A. It did.

Q. And during that time did it have activities going on such as stock transfers here?

A. It did.

Q. Now, Mr. Adams, in respect to the judgment that we are concerned with here, a judgment not introduced in evidence yet, but you're acquainted with the litigation here. Can you tell me if anything has been paid on that judgment, and if so, the approximate amounts?

Mr. Robertson: Objected to, your Honor, as being incompetent, irrelevant and immaterial. The only issue before this Court is the title to two thousand shares of stock in Dean Witter and Company, and whether or not any sums of money have been paid on judgment is not an issue before this Court, as framed by the pleadings.

Mr. Clausen: Well, your Honor, the stock itself, the stock itself to be applied on the judgment, and the stock itself, your Honor, the stock itself would be available to Blair for that purpose and, there-

(Testimony of Harry S. Adams.)

fore, my question is to show that little, very small amounts have been paid. The judgment, your Honor, is a very substantial judgment, that very small amounts have been paid on the judgment by the process of execution and by the process of application of funds.

Mr. Robertson: Whether or not, your Honor, Mr. Crofoot [48] has or has not paid any sums on the judgment is not an issue in this case.

The Court: I don't see it has any.

Mr. Clausen: It would have its application, this materiality, your Honor, that if Blair had the judgment, in the alternate, that Blair would be entitled to apply, your Honor, on the payment of the judgment the very stock here in issue. In other words, the purpose, your Honor, of the proceeding here would be a bond to indemnify and protect Blair and, therefore, the stock itself here in dispute, the stock in issue would be the property of Blair in order to apply on the judgment.

The Court: I will allow it over your motion to strike and over your objections.

Q. (By Mr. Clausen): Mr. Adams, what is the status of the account?

A. Somewhere in the neighborhood of \$2,600 have been paid on the judgment.

Q. Is that all? A. That is all.

Q. What is the present value of the stock, Blair Holdings Corporation stock we are concerned with?

A. Traded yesterday at two seventy-five a share.

(Testimony of Harry S. Adams.)

Mr. Clausen: That is all. You may take the witness. Pardon me, one more question. [49]

Q. There is an allegation in the complaint in interpleader and I believe there has been a denial, so I will ask the question in quick form by reading this allegation, tell me whether it is correct:

“Defendant Blair Holdings Corporation is a corporation incorporated under the laws of the State of New York. Defendant Blair-Rollins & Co., Incorporated, is a corporation incorporated under the laws of the State of Delaware. Defendant Blair & Co., Inc., of New York is a corporation incorporated under the laws of the State of California.”

As far as you know those allegations are correct, are they? A. They are.

Mr. Clausen: That is all.

Cross-Examination

By Mr. Robertson:

Mr. Robertson: May it please the Court, without prejudice to my motion to strike the exhibits of the Blair parties concerning the writs of execution, I would like to pursue one or two questions with this witness.

Q. Mr. Adams, are you aware of the fact that counsel for Blair Holdings Corporation levied a writ of execution on Blair Holdings Corporation some time in 1951? A. In detail, no.

Q. Can you tell us whether or not your corporation made a [50] return to the Sheriff of that writ of execution? A. I cannot.

(Testimony of Harry S. Adams.)

Q. Is there anyone in your company who can so testify?

A. Mr. Wendell, former assistant secretary, is no longer with the corporation.

Mr. Robertson: Counsel, would you be willing to stipulate that the return by Blair Holdings Corporation was not made to the Sheriff on that writ of execution?

Mr. Clausen: I will be glad to examine the books and records and stipulate with counsel as to the fact.

Q. (By Mr. Robertson): Mr. Adams, as the vice president of Blair Holdings Corporation, do you claim that the Blair Holdings Corporation has any judgment against the Bay City Bank and Trust Company of Bay City, Texas?

Mr. Clausen: Object to that, your Honor, on the ground the judgment speaks for itself.

The Court: If he knows he may answer.

A. To my knowledge, I don't know.

Q. (By Mr. Robertson): Do you know whether the Blair Holdings Corporation claim to have any judgment against Phillip Barnett?

A. Not to my knowledge.

Mr. Robertson: No further questions, your Honor.

The Court: Step down.

Mr. Clausen: That is all, Mr. Adams. May the witness be excused, your Honor? [51]

The Court: May he be excused? You may be excused.

(Witness excused.)

Mr. Robertson: I will stipulate that order was made and bond was issued.

Mr. Clausen: Your Honor, we offer in evidence at this time as the Blair's next exhibit in order a certified copy of a bond in the action 383427 made by Judge Sapiro on February 8 of 1949. That is the bond, your Honor, that is referred to in Defendant's Exhibit 2-B, and which, among other things, the stock was supposed to take the place of.

The Court: Be admitted and marked.

The Clerk: Defendant's Exhibit 7-B, admitted and filed in evidence.

(Whereupon document entitled, "Order in Case No. 383427," was received in evidence and marked Defendants' Exhibit 7-B.)

Mr. Clausen: This order, your Honor, reads as follows:

"The above-entitled matter having come on regularly for hearing before the above-entitled court, Department No. 19 thereof, the Honorable Milton D. Sapiro, Judge, presiding, * * *" and so forth—"defendants, Blair Holdings Corporation, a corporation; Jean Lambert and Frank Reed, appearing by Henry C. Clausen, Esq., their attorney, in response to order to show cause * * *"—— [52]

Mr. Robertson: I will waive the reading of that order.

Mr. Clausen: I just would like to acquaint the Court as I go along.

The Court: He may read it.

Mr. Robertson: All right, your Honor.

Mr. Clausen (Continuing): “* * * in response to an order to show cause heretofore issued by the above-entitled court on the 21st day of January, 1949”—continued to February 3, introduction of evidence.

“It Is Hereby Ordered that the defendants, Blair Holdings Corporation, a corporation, and Jean Lambert transfer those certain shares of the capital stock of the defendant, Blair Holdings Corporation, a corporation, represented by”—and there are four numbers—“* * * for five thousand shares each * * * as requested by the plaintiff or its agent upon the deposit with said defendant, Jean Lambert, as transfer agent for the said defendant, Blair Holdings Corporation, a corporation, an indemnity bond in the sum of \$50,000 to said corporation to protect said corporation, its officers, transfer agents and registrars, or any of them, against any loss, damage or expense or other liability to the owner of the shares by reason of the recordation of the transfer or the issuance of a new certificate for shares, in the form and for the [53] purpose and on the conditions set forth in Section 2409 of the Corporations Code of the State of California within seven days from and after the date hereof.”

Then I have here a copy of a bond that was said by counsel at the time to be the bond which I will introduce as the defendant Blair's exhibit next in order.

The Court: Admitted and marked in evidence.

The Clerk: Defendant's Exhibit 8-B admitted and filed in evidence.

(Whereupon carbon copy of bond on the letterhead of the United States Guaranty Company referred to above was received into evidence and marked Defendants' Exhibit 8-B.)

Mr. Robertson: Your Honor, this order that counsel has just read is in the Superior Court of San Francisco, entitled "Bay City Bank and Trust Company, a corporation, vs. Blair Holdings Corporation, a corporation; Jean Lambert, Frank Reed, and Virgil Dardi, defendants, case number 383427." Those are the only parties, and there is a reference to the transfer of the stock, plaintiff's stock, and the reference there is to the plaintiff, Bay City Bank and Trust Company. I point that out to your Honor because subsequently after that order there were some cross-defendants and cross-complaints and other parties brought in. At that time the Court ordered Blair to [54] turn over Bay City stock upon the posting of a bond.

Mr. Clausen: I offer in evidence now a copy of the award of the Arbitrator.

Mr. Robertson: We will object to the introduction in evidence of that award, your Honor, as being incompetent, irrelevant and immaterial, not the best evidence in that pursuant to counsel's own statement it has been modified by the Superior Court. I believe that any evidence with regards to the ultimate outcome of the litigation in the Superior Court is pertinent, it would be the decision of the ultimate court, the District Court of Appeals which came out in 1953. This order, this

merely is an award of an arbitrator which is subsequently taken to the Superior Court and modified by the Superior Court and confirmed by that Court and the day the confirmation was entered by the Superior Court it was appealed, and the Appellate Court upheld that. I think the Appellate Court decision would be the best evidence.

Mr. Clausen: If the Court please, I have all the other papers, to which counsel have averted, but this is one of the links in the chain and hard to understand the other papers without seeing—this is one of the documents before the Appellate Court, this is the actual award.

The Court: What did the Court do about it?

Mr. Clausen: It confirmed, it affirmed the judgment, that was granted on this award and which judgment was ordered [55] by Judge Devine pursuant to my motion.

Mr. Robertson: Which award of the Arbitrator held that there was conversion of the Bay City stock, of the Crofoot stock, and ordered payment to Crofoot and Bay City of the amount of the bond and held there was conversion.

Mr. Clausen: Whatever the Arbitrator held it is there, your Honor. That is the reason why it is necessary.

The Court: In the interests of time I think we better allow it to go in to be used by either side subject to your motion to strike and over your objection.

The Clerk: Defendant's Exhibit 9-B admitted and filed in evidence.

(Whereupon document entitled, "Award of the Arbitrator, March 6, 1950," referred to above, was received in evidence and marked Defendants' Exhibit 9-B.)

Mr. Clausen: I have now and introduce in evidence—rather, it is a photostatic copy of a certified copy of the Order by Judge Devine correcting and confirming the Award of the Arbitrator.

The Court: Be admitted next in order.

The Clerk: Defendants' Exhibit 10-B admitted and filed in evidence.

(Whereupon document entitled, "Order correcting and confirming Award of Arbitrator, No. 386971," [56] referred to above, was received in evidence and marked Defendants' Exhibit 10-B.)

Mr. Clausen: I have here, your Honor, and I offer in evidence a photostatic copy of a certified copy of the Judgment of the Superior Court on the Award of the Arbitrator as Corrected.

The Court: No objection; it may be admitted and marked.

The Clerk: Defendants' Exhibit 11-B admitted and filed in evidence.

(Whereupon document entitled, "Judgment on Corrected Award of Arbitrator," referred to above, was received in evidence and marked Defendants' Exhibit No. 11-B.)

Mr. Robertson: May it please the Court, in line with the objections on the award of the Arbitrator,

we object to the introduction in evidence of the judgment in that it contains no issues relevant to the question before the Court today and that is what, who owns the sixteen hundred shares of stock in Dean Witter and Company.

The Court: Well, I suppose it will be conceded the crux of this case is the ownership of this stock.

Mr. Clausen: That's right, that is why these are being offered, to show the ownership in Blair.

Mr. Robertson: Nothing there said in the judgment or decrees which relates to the ownership of stock. [57]

The Court: What is there in that that indicates ownership of stock?

Mr. Clausen: In this way, your Honor: The judgment, Paragraph 2 of this same judgment:

“It Is Hereby Further Ordered, Adjudged and Decreed that the said Blair Holdings Corporation, a corporation, do have and recover of and from the said E. J. Crofoot, the sum of \$77,931, with interest thereon at the rate of 7 per cent per annum from date hereof until paid (as and for damages for fraudulent deceive as follows:

“(1) Misrepresentations as to the March 31, 1947, balance sheet or as to the income statements for the months of January, February and March, 1947, or (2) for misrepresentations as to unfilled orders as of March 31, 1947);” so that is a matter, your Honor——

Mr. Robertson: Well, if the Court pleases——

Mr. Clausen: And then it stated:

“* * * and that the recovery by said Blair Hold-

ings Corporation of this judgment under II”—that is Paragraph II—“shall satisfy the other judgments herein for damages against said E. J. Crofoot, and shall satisfy, pro tanto, the judgment hereinafter for damages against said Paul [58] Rice.”

In Paragraph III: “It Is Hereby Further Ordered, Adjudged and Decreed that said Blair Holdings Corporation, a corporation, do have and recover of and from said E. J. Crofoot, the sum of \$35,158.56, with interest thereon at the rate of 7 per cent * * * (as and for damages for fraudulent breach of fiduciary obligations to disclose to Blair Holdings Corporation the existence of the CMAC Guaranty), * * *”

The Court: Has the judgment been satisfied on that?

Mr. Clausen: No, your Honor. No, that is why I had Mr. Adams testify this morning, none of these have been satisfied.

Mr. Robertson: But, your Honor——

Mr. Clausen: The only amounts paid on account or deposited on account was this small sum that he mentioned.

Mr. Robertson: If it please the Court, I don't like to interrupt, but in the interests of time, your Honor, I would ask where does that judgment relate to these particular shares of stock and this stock of Dean Witter, interpleader against Blair, Crofoot, Bay City Bank and Trust, and Phillip Barnett? Now, the only interest in the title of the stock in the Dean Witter Company, Mr. Barnett in

his answer set up an issue in this suit that the Arbitrator did not dispose of that stock or enter any award upon it. I don't think anyone here can realistically or reasonably contend he did, because he did not make any award relating to that stock. The other [59] provision under the stipulation says if he did, that it should be distributed—not distributed, should be released pursuant to order of the Arbitrator or by joint order of the parties, and the Arbitrator did not make any award on that score whatsoever. They have admitted they don't claim any judgment against Barnett or the Bay City Bank and Trust. We claim we own the stock. We have demonstrated that conclusively, have title in that stock in Dean Witter. That is an irrelevant issue in this decree about breach of warranty as to Crofoot and so forth, hasn't any bearing whatsoever in this case.

I do admit this, that if they have a judgment against Mr. Crofoot they can go out and levy an execution on his automobile or on his property. Now the issue is that they claim this sixteen hundred shares of stock is Crofoot's; we claim it is Bay City's, and we have demonstrated the title to the stock. I think they should demonstrate that Crofoot has title to that stock, otherwise they have no right to levy a writ of execution upon it and when they levied a writ of execution Dean Witter responded before this suit was filed that Crofoot has no account with them.

Mr. Clausen: Now, your Honor, counsel is again embarking upon the realm of argument. I just get

myself back in the position I was in when I was reading this and called the Court's attention to the fact that I would like at the proper time sufficient time to argue the case. [60]

Now, our position in brief, again, as I said before, is this: That by the statement in writing of Barnett, as well as these others, in so many words we think the stock was either Blair's or Crofoot's, and when Crofoot does not claim it, it belongs to Blair, your Honor, under the terms of the document.

But counsel is in error when he says there is no reference in this judgment to stock, and I will come to that. [61]

Mr. Robertson: You show me in that judgment where——

Mr. Clausen: Counsel!

Mr. Robertson: ——where the Arbitrator made an award relative to the two thousand shares of stock.

Mr. Clausen: Your Honor, may I proceed without interruption of Counsel?

The Court: If you gentlemen are not careful, you will make me nervous. Proceed.

Mr. Clausen: Your Honor, I was in the middle of Paragraph Three. In order to get the continuity, may I reread it?

Blair recovers from Crofoot the sum of Thirty-five Thousand some odd dollars plus——

“* * * (as and for damages for fraudulent breach of fiduciary obligation to disclose to Blair Holdings Corporation the existence of the C.M.A.C. guarantee), and the recovery by said Blair Holdings Cor-

poration of this judgment under III hereof shall satisfy the judgment for said Blair Holdings Corporation under I above to the extent of Subparagraphs (A) and (C) thereof * * * and the judgment * * * under II above to the extent of the difference in amount * * *''

Paragraph IV further ordered, adjudged and decreed that [62] Blair Holdings Corporation recover from Paul Rice the sum of some \$25,000 plus, with interest at six per cent until paid, and recovery by Blair of this would satisfy, pro tanto the recovery against Crofoot.

And then in five, it is hereby ordered, adjudged and decreed that provided that said E. J. Crofoot shall first have transferred to said Blair Holdings Corporation thirty-three thousand seven hundred and twenty-five shares of its stock evidence by its certificates therefor, that the said E. J. Crofoot shall have and recover from said Blair Holdings Corporation the sum of \$158,182.86 with no interest, except at the rate of seven per cent from the date of said transfer until paid, comprising the sum of \$144,522.50 damages for the conversion of fifty-one thousand seven hundred and twenty-five shares of said Blair Holdings Corporation stock, the sum of twelve thousand some odd dollars as the net amount of dividends withheld, and \$729 as the interest on said dividends at six per cent per annum, all provided, however, that recovery by said Crofoot of this judgment under V hereof shall satisfy the judgment for said Crofoot under VI hereinafter, to

the extent that the said \$158,000 odd dollars and that the said judgment under V hereof for the said Crofoot and its enforcement is hereby conditioned, that the said E. J. Crofoot first transfer to said Blair Holdings Corporation 33,725 shares of its said stock evidenced by its certificates therefor. [63]

The Court: Does that have to do with our shares here in question?

Mr. Clausen: He would be entitled, your Honor——

Mr. Robertson: No, your Honor.

Mr. Clausen: He would be entitled, your Honor, if the two thousand shares of stock here proceed according to the terms of the——

The Court: What stock are they talking about in that transaction?

Mr. Clausen: They are talking about the stock of Blair Holdings Corporation, the same kind of stock.

Mr. Robertson: Which he owns——

Mr. Clausen: Pardon me, Mr. Robertson. Any kind of stock, Blair Holdings Corporation stock, this identical kind of stock.

The Court: I see.

Mr. Clausen: In other words, how or where he would get the stock would be up to him, because the way it reads, your Honor, is just like that, and of course, as Mr. Adams testified this morning, nothing has been paid on the judgment. So——

Mr. Robertson: That is the very point we make, your Honor.

Mr. Clausen: Thirty-three thousand seven hundred and twenty-five shares of its stock, it says: "Of its stock." Any kind of its stock.

Mr. Robertson: If this stock in Dean Witter is Crofoot's, [64] then they can execute on it. That is the whole issue. We say it is not Crofoot's.

Mr. Clausen: Your Honor, I don't know, Counsel interrupts like that, I don't know, if by not replying, your Honor, whether your Honor wants me to reply or not.

The Court: You may go along, I allow the widest latitude, so much so I could be very well criticized, in order to get to the truth of the situations.

All right, we will proceed.

Mr. Clausen: The balance of this paragraph V, again, your Honor, is further to the effect that Blair, your Honor, couldn't recover twice. You see, with all these actions going, some of Blair's grounds or cause of action against Crofoot and against Rice were fraud as the Court here outlined here——

The Court: That fraud may have occurred there, but I can't see this has any relation to what we are trying to do here, namely, establish the ownership legally.

Mr. Clausen: Of two thousand shares.

The Court: Yes.

Mr. Clausen: But I say to your Honor that some of the causes of action were for fraud and some were for breach of warranty.

The Court: Yes.

Mr. Clausen: That is the reason why the Court here, in following the award, your Honor, mentioned that if you recover [65] under this paragraph that you can't recover under that paragraph.

In other words, one recovery would also carry with it the recovery for the other grounds and causes of action. That is the reason for the alternative.

The Court: Well, in any event, the judgment will speak for itself.

Mr. Clausen: That is right, your Honor.

The Court: All right.

Mr. Clausen: Now, Paragraph VI, your Honor, is again that provided that Crofoot shall first transfer to Blair Holdings Corporation thirty-three thousand seven hundred and twenty-five shares of its stock, that Crofoot then would recover, could recover from Blair and Virgil Dardi jointly the sum of \$159,000 some odd dollars as joint damages, and again with alternative selections and extinguishments of the judgment.

Then Paragraph VII, further ordered that Crofoot recover from Blair Holdings Corporation the sum of \$1,270 with interest at seven per cent, cost to Crofoot of the bond posted to transfer twenty thousand shares of said stock. That, your Honor, ties into the bond that has been introduced here in evidence, and again, your Honor, it refers to the same kind of stock.

Then Paragraph VIII has to do with Rice. Paragraph VIII, your Honor, is to the effect that pro-

vided the necessary transference of some seven thousand and fifty shares, that Rice [66] similarly may recover certain judgments against Blair in the sum \$23,000.

Then Paragraph IX is again a small item of \$300.

And Paragraph XI is to the effect that all contentions of the parties in the Arbitration proceedings are finally, conclusively determined by the Court, by the Arbitrator as confirmed in this judgment, and dismissing, or rather finding that there is nothing as to certain other defendants.

Now, your Honor, I offer in evidence merely for convenience of the Court, the decision of the District Court of Appeal. I have a copy here of the advance sheet your Honor.

The Court: Very well.

Mr. Clausen: It is reported in 119 A.C.A. Page 207, which summarizes all that I have been trying to say in much more succinct fashion.

The Clerk: Defendant's Exhibit 12-B admitted and filed in evidence.

(Whereupon Decision of the District Court of Appeal, referred to and more particularly described above, was received in evidence and marked Defendant's Exhibit 12-B.)

Mr. Clausen: Your Honor, I was thinking, as I was reading that Judgment, I don't know if I asked Mr. Adams, the fact is that neither Rice—I certainly intended it to be included by the question I asked—neither Rice nor Crofoot, [67] except as may possibly be the case under the stipulation as to

two thousand shares, but neither Crofoot nor Rice have ever delivered to Blair; I will put it, Crofoot certainly has never delivered to Blair——

Mr. Robertson: Your Honor please, may it please the Court——

Mr. Clausen: May I——

Mr. Robertson: I wish to interpose an objection to statements about whether this judgment has or has not been satisfied by Counsel, because it is incompetent, irrelevant and immaterial. It does not in any way relate to the issues before this Court as to the title of the sixteen hundred shares of stock. Again I wish to state, your Honor, that we claim no interest in the other four hundred shares. Whether this judgment has or has not been set aside, has nothing to do with the title of that stock.

Mr. Clausen: I was on the point of saying, your Honor, I didn't recall whether I asked Mr. Adams if Crofoot had delivered to Blair the specific stocks here referred to by the Court in its judgment, 33,725 shares, except as it may be the two thousand here in Court, and therefore I would like the privilege of having Mr. Adams come back and I will ask him that question.

The Court: Maybe you can get a stipulation.

Mr. Clausen: Exactly what I wanted to ask. Will it be [68] stipulated if I asked him this he will testify to the effect that none of the thirty-three thousand, seven hundred and twenty-five shares have been transferred to Blair by Crofoot and——

Mr. Robertson: I will so stipulate that if the witness was called, he would so testify. However, I

will interpose an objection to such question on the grounds it is incompetent, irrelevant and immaterial.

Mr. Clausen: I understand.

The Court: I think his objection is good; I will give you a record on it.

Mr. Clausen: Yes, your Honor. May we have the same stipulation that Paul Rice has not transferred those seven thousand fifty shares to Blair?

Mr. Robertson: I will so stipulate that he would so testify, and interpose the same objection to the question, incompetent, irrelevant and immaterial.

Mr. Clausen: All right.

The Court: Let the record so show.

Mr. Clausen: That is all we have at this time, your Honor.

The Court: Is that your case?

Mr. Clausen: It is the case of the Blair Corporation at this point, your Honor.

The Court: Well, at this point what else have you got? [69]

Mr. Clausen: Why, I would assume they would put on—we are both defendants, so as far as I am concerned, I would say we rest, your Honor, for Blair Holdings Corporation. [70]

* * *

June 9, 1954—2:00 P.M.

Mr. Robertson: Proceed, your Honor?

The Court: Yes.

Mr. Robertson: Defendant Bay City and Phillip Barnett will call Phillip Barnett as their witness.

PHILLIP BARNETT

one of the defendants herein, was called on his own behalf and on behalf of the defendant Bay City Bank & Trust Company, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Please state your name for the record.

The Witness: Phillip Barnett.

Direct Examination

By Mr. Robertson:

Q. You're an attorney-at-law, licensed to practice in the State of California? A. I am.

Q. Were you retained by the Bay City Bank & Trust Company, Bay City, Texas, in regards to certain shares of stock, Blair Holdings Corporation? A. I was.

Q. When were you so retained?

A. The latter part of 1948. [72]

Q. And what were you retained by the Bay City Bank to do?

Mr. Clausen: Object to that, your Honor, as incompetent, irrelevant, immaterial.

(Testimony of Phillip Barnett.)

The Court: Objection overruled. He may answer.

The Witness: I was retained by them to force Blair and Company to transfer on their books twenty thousand shares of stock that formerly stood in the name of E. J. Crofoot. Bay City Bank wanted to sell those shares of stock.

Q. And do you know of your own knowledge, personal knowledge, how Bay City Bank acquired those shares of stock? A. I do.

Q. And how did they so acquire the twenty thousand shares of stock?

A. They were pledged as security for a payment of thirty-five odd thousand dollars, which the Bay City Bank & Trust Company of Bay City, Texas, loaned to Mr. Crofoot and/or a rice mill that he was interested in.

Q. And these shares of stock were pledged to secure that note, is that correct?

A. They were pledged to secure that note and in the possession of the Bay City Bank and Trust Company in Bay City, Texas.

Q. And do you know what occasioned the Bank to request your assistance in securing the transfer of those shares of stock?

A. Blair and Company refused to transfer the shares of stock on their books. [73]

Q. And for what reasons, why was the Bank wishing to dispose of those shares of stock?

A. Mr. Crofoot was delinquent in his payment to the Bay City Bank and Trust Company. He

(Testimony of Phillip Barnett.)

could not pay the principal sum of the loan which was due and owing.

Q. Are you familiar with the substance, the terms that existed between Bay City Bank and Trust Company and the defendant Crofoot here?

A. I am. I have a copy in our files.

Q. And what, in substance, were the terms of those notes?

Mr. Clausen: I object to that, the note would be the best evidence.

Mr. Robertson: I asked the witness, your Honor, if he was familiar with the general terms and conditions of the note. He said that he was, and I asked him generally what those terms were. I have in mind, your Honor, just one point here, that is, that the Court provided, in addition to the payment of the principal balance of the note, which was thirty-five thousand, also provided for a ten per cent charge for attorney fees in the event the notes had to be collected or collateral had to be sold for collection, and I want to develop Mr. Barnett's claim here in this stock arrangement that he had with the bank, that the balance of shares not needed to liquidate this note would be for his retainer fee, for services rendered. [74]

The Court: Counsel is calling for the best evidence.

The Witness: You have the note there.

Mr. Robertson: I have a copy of the note there. Counsel, the original note, as I recall, was put in evidence before the arbitrator, which you are fa-

(Testimony of Phillip Barnett.)

miliar with. Wonder if you would stipulate a copy may be——

Mr. Clausen: I can't stipulate to the note; I can't.

Mr. Robertson: I ask you, Mr. Barnett, whether you know of your own knowledge that the original of this note was placed in evidence before the Arbitrator in the proceedings in the Superior Court?

A. That is my recollection.

Q. Do you recall what the terms of that note provided in regard to attorney's fees?

A. Ten per cent.

Mr. Clausen: I object to that——

The Witness: The principal due——

Mr. Clausen: Pardon me, Mr. Barnett. I object to it, same ground, your Honor, that the note would be the best evidence.

The Court: If it is available, if it is not, why, he may. Is it available, do you know?

Mr. Robertson: No, your Honor, the original note, as I recall—that has been some four years ago, was in evidence before the Arbitrator, and we made an agreement in the [75] Arbitration proceedings that the Arbitrator would keep all those files at Stanford University, depending upon the order of the various parties as to disposition. As far as I know, that is still in those files.

The Witness: That's a copy.

Mr. Robertson: We have a copy of the note here which was used also in reference to the Arbitration Proceedings. I believe the witness can identify this

(Testimony of Phillip Barnett.)

as a true and exact copy of the note which he has knowledge of.

The Witness: Show it to him. I recognize this as a copy of that note which shows that it is secured by twenty thousand shares of stock.

Mr. Clausen: I object to the witness volunteering as to what it shows, your Honor.

The Court: Well, secondary evidence is admissible here in the absence of being able to produce the original, and if he is familiar with it, he may testify. Objection overruled.

The Witness: It is dated Bay City, Texas, 9-16-48, \$35,000, six months after date, without grace, for value received, I, we, or either of us, promise to pay to the order of the Bay City Bank and Trust Company, Bay City, Texas, \$35,000.

And then it states the ten per cent of the total amount shall be used for attorney's fees and costs. And then in the left-hand side, secured by twenty thousand shares of Blair and [76] Company stock. It is signed Tuckerman Rice Milling Company by J. K. Carr and E. J. Crofoot.

That is a copy, as I remember it, of the original note.

Mr. Robertson: The defendant Bay City Bank, your Honor, will introduce this as their next exhibit in order.

The Court: May be admitted and marked next in order.

Mr. Robertson: Thank you.

(Testimony of Phillip Barnett.)

The Clerk: Defendant's Exhibit E admitted and filed in evidence.

(Whereupon note from Carr & Crofoot to Bay City Bank and Trust Company, dated 9/16/48, referred to and more particularly identified above, was received in evidence and marked Defendant's Exhibit E.)

Mr. Clausen: Your Honor, may my objection of this morning, your Honor, run to this line of testimony? I objected this morning, your Honor, that this was irrelevant to the main issues and to the written documents, and an attempt to vary the written documents, being the stipulation, your Honor, which was sent to Witter and Company, and I would assume that my objection is covered by your Honor's admission of the evidence this morning subject to my later motion to strike.

The Court: Very well.

Q. (By Mr. Robertson): Mr. Barnett, subsequent to your retention by the Bay City Bank to secure the transfer of the [77] stock, will you please tell us what steps were taken by you to secure the transfer of those twenty thousand shares of stock?

A. Well, I first attempted to, by other than litigation, to persuade Blair and Company to transfer the stock through a Mr. Reed, who was the transfer agent, and a Miss Lambert, who was in the office of Blair and Company. And failing to accomplish that, we instituted a suit in the State Court pursuant to the Corporations Code, in which we

(Testimony of Phillip Barnett.)

sought to compel Blair and Company to transfer the stock. Litigation resulted from that, as a result of which, upon the securing of a bond in the sum of \$50,000 to indemnify Blair if they suffered any damage from the transfer of the stock, we had it subsequently transferred pursuant to that order to show cause.

Q. That was the order that was introduced this morning as Blair Exhibit 7-B, Judge Sapiro's order?

A. I believe so, yes.

Q. And Mr. Barnett, subsequent to the execution of Judge Sapiro's order, Blair's Exhibit 7-B, were you able to effect the transfer of these twenty thousand shares of stock on the books of the Blair Company from the name of Edmund J. Crofoot to Bay City Bank and Trust Company?

A. Well, not immediately, but we accomplished it subsequently, some resistance by Blair, in spite of the order, but we subsequently accomplished [78] it.

Q. And I show you, Mr. Barnett, an invoice under the heading of Blair and Company, dated March 5, 1949, and addressed to Mr. Phillip Barnett, Attorney, regards to Certificates Nos. SHF 2805, 2806, 2807, and 2808, issued to the Bay City Bank and Trust Company for five thousand shares each, or a total of twenty thousand. Ask you if you received that from the Blair Holdings Corporation?

A. I did.

Q. And what is that document, Mr. Barnett?

A. Well, it purports to be a delivery receipt,

(Testimony of Phillip Barnett.)

which it is, says, "We enclose the following stock certificates of this corporation," enumerating them and issued to the Bay City Bank and Trust Company from the name of E. J. Crofoot. I deposited those very shares with Dean Witter subsequently.

Mr. Robertson: Offer this as our next exhibit in order.

The Court: May be admitted and marked.

The Clerk: Defendant's Exhibit F, admitted and filed in evidence.

(Whereupon Invoice of Blair & Company, dated March 5, 1949, referred to and more particularly described above, was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Robertson): So that upon these twenty thousand shares of stock as transferred by Blair to Bay City Bank, you caused them to be deposited with Dean Witter and Company? [79]

A. I did.

Q. And to whose account were they deposited in Dean Witter and Company?

A. Bay City Bank and Trust Company, subject to my directions as to sale.

Q. And what instructions did you have from the Bay City Bank and Trust Company regarding the sale of those shares of stock?

A. Sell them.

Q. And did you do this?

A. I did in such a manner as would not disturb

(Testimony of Phillip Barnett.)

the market too much. Mr. Dardi, who is the head of Blair——

Mr. Clausen: Object to that as a gratuitous statement and ask it go out. Counsel is volunteering, and he has already answered the question.

Mr. Robertson: He said he did sell them, and now he is explaining how he sold them.

Mr. Clausen: Your Honor, the question called for just yes or no, and Counsel is a witness who is testifying, and I think——

The Court: In any event, you did what? What is the ultimate fact?

The Witness: Well, I sold them, your Honor, but we sold them in such a way as not to disturb the market too much. That was at the request of Mr. Dardi of Blair and Company, with which request we cooperated. [80]

Mr. Clausen: The last part, your Honor, is what I objected to, should go out, requests hearsay.

The Court: Is Mr. Dardi available?

Mr. Clausen: Not an officer any more, as I understand it.

The Court: Let the record stand.

Q. (By Mr. Robertson): Mr. Barnett, what was done with the proceeds of the sale of the shares of stock under the name of Bay City?

A. The proceeds were deposited with Wells Fargo Bank in the account of the Bay City Bank and Trust Company, or credited to their account to the Bay City people.

Q. Now, Mr. Barnett, I will show you Defend-

(Testimony of Phillip Barnett.)

ant Bay City's Exhibit C, which is a ledger sheet of Dean Witter and Company relating to the sale of those stocks. I will ask you if it is not a fact that said ledger sheet demonstrates that the early sales made of parcels of said stock were sold at approximately \$2.25 a share, is that correct?

A. That's correct.

Q. And subsequently sales were getting down to around, March 16th they were only selling for about \$1.50 a share, is that correct?

A. Yes, that is correct.

Q. And did the reduction in the sales price of the shares have anything to do with the failure or withholding of sale of any further stock in that Dean Witter account? [81]

A. Well, that, as well as the general atmosphere existing at or about that time. I mean, the atmosphere between the parties involved.

Q. Now, Mr. Barnett, did you have a prearrangement with the Bay City Bank which relates to the shares of stock on deposit with Dean Witter and Company?

A. Well, it was understood I was to get ten per cent, as the note called for.

Q. Attorneys' fees for services?

A. Attorneys' fees and costs.

Q. And I will ask you, Mr. Barnett, what is your claim or the claim of your client, Bay City Bank and Trust Company, to the shares in the Dean Witter Company at the present time, which is the subject matter of this suit?

(Testimony of Phillip Barnett.)

Mr. Clausen: Object to that, your Honor, calling for the conclusion, asking a lawyer on the witness stand to argue the case, what his claim is. The claim is set forth in the pleadings.

The Court: I will allow the question. Objection overruled. You may cross-examine him.

The Witness: Well, it is the fact that this part of the twenty thousand originally deposited to all the purposes of the pledge, and it is still, in my opinion, the property of the Bay City Bank and Trust Company, or myself as their authorized agent; always has been. [82]

Q. (By Mr. Robertson): Mr. Barnett, just for the record, I show you a letter, copy of a letter of March 11, 1949, from you to Dean Witter and Company.

While Counsel is looking at that, your Honor, I might say——

Mr. Clausen: Well, now, I can't do both.

Mr. Robertson: All right, go ahead. I am sorry.

I might say to Counsel, your Honor, that we have a copy of a letter sent to Dean Witter on March 11, 1949. We searched Witter's letter files this morning, which were subpoenaed, and the original does not appear to be there, and I was advised by the gentleman who appeared today that a Mr. Stack formerly handled this matter for Dean Witter, but he is no longer with them, and some of the files may have been misplaced, and for that reason we don't have the original of this letter, and produce the copy of it and ask the witness to identify it.

(Testimony of Phillip Barnett.)

Q. (By Mr. Robertson): I show you a copy, Mr. Barnett, of this letter of March 11, 1949, from you to Dean Witter, transmitting certain shares of stock to Dean Witter in the total number of fifteen thousand, and ask if you sent that letter to Dean Witter with the stock certificates?

A. Yes, and as the letter states, that the fifteen thousand were, together with the five thousand sent two days before, makes the twenty thousand.

Q. That is the covering letter that, from which the fifteen [83] thousand shares and previous five thousand were deposited with Dean Witter?

A. Yes, that's correct.

Mr. Robertson: The defendant Bay City Bank offers this as their next in order, your Honor.

The Court: Be admitted and marked.

The Clerk: Defendant's Exhibit G admitted and filed in evidence.

(Whereupon copy of letter dated March 11, 1949, from Barnett to Dean Witter, referred to and more particularly described at Page 83 of this transcript, was received in evidence and marked Defendant's Exhibit G.)

Q. (By Mr. Robertson): Now, Mr. Barnett, on or about April 26, an Arbitration Proceeding commenced before Judge, or Arbitrator Osborne in these various matters between Bay City Bank, Crofoot and Blair, is that correct?

A. That is correct.

Q. Are you familiar with the facts and circum-

(Testimony of Phillip Barnett.)

stances surrounding the execution of the stipulation, which is Defendant Blair's No. 2-B?

A. I am.

Q. I will show you two stipulations—they are two different stipulations, but they contain the same subject matter and [84] merely in two copies for the purpose of various signatures, isn't that correct?

A. That's correct.

Q. Would you state, please, the circumstances surrounding the execution of that stipulation?

Mr. Clausen: I object to that, your Honor—we would object to that, your Honor, as incompetent, irrelevant and immaterial. The stipulation speaks for itself; it is a signed document, no ambiguities in it.

The Court: Well, I will allow it. It is a preliminary question; I don't know what it is.

The Witness: Well, the first suit was the Bay City Bank and Trust Company against Blair to force them to transfer this stock into its name from E. J. Crofoot. Blair filed a cross-complaint bringing in additional parties, and then those additional parties filed cross-complaints, bringing in other parties. By the time it simmered down to the real end of the pleading stages, the Bay City Bank and Trust Company was remotely removed from the real party in interest by charges of fraud and counter-charges of fraud and deceptions and what-not, and Mr. Clausen and I were, I think, chief counsel at the start, and against our advice, and we sort of

(Testimony of Phillip Barnett.)

were substituted by New York counsel, and then it seems that Crofoot and Dardi again, without the consent of Mr. Clausen or myself, agreed to some type of an arbitration, and we found ourselves [84-A] a little bit removed from the active participation of the trial, except in certain particulars.

It seems that the two principals went down and agreed on Mr. Osborne to arbitrate these issues, and we went along on stipulations, not only this one, there were other stipulations, as far as we could go, not that we wanted to do that, but we out of expediency and in the hope of compromising this entire mess something may result.

The Arbitration proceedings started, I believe, in April, or thereabouts, and in the meantime the premium on this bond on fifty odd thousand dollars came due again with a premium of a thousand odd dollars, and we thought that from a practical point of view it was rather ridiculous to spend this \$1,000 inasmuch as Blair and Company was already protected by the bond and the premium paid on that bond, and that for the few shares remaining as of that time, the exact number escapes me, it would just be a waste of money, no matter who won, to pay the thousand dollars.

So in the spirit of assisting in this general atmosphere of trying to compromise, and these talks were going on, it was suggested, I don't know who suggested it, but I think Mr. Clausen did, or Mr. Whitney, one of them, Mr. Halloran, from New York, that if we would leave the sixteen hundred shares

(Testimony of Phillip Barnett.)

up and raise that to two thousand, why, they would forego the expense of this bond, and that was the only reason for leaving [85] that stock alone.

I contacted the Bay City Bank and Trust Company, Mr. Hamill, and I spoke with the parties interested, and I could see no harm in doing that. I thought it was a practical thing to do. But Mr. Crofoot did not, at that time, have four hundred shares of Blair stock, nor did my clients feel like putting up any more than was actually there. So in the spirit of assisting in this phase of it, Mr. Dardi, who was the President, and he really dictated the policies of Blair and Company, loaned four hundred shares, and that was likewise placed in escrow making up the two thousand shares. And that was the only purpose of it so that we could eliminate the cost of the bond. But it was never intended to transfer title to anybody.

Q. Now, neither yourself nor the Bay City Bank claimed any interest in the four hundred shares, to your knowledge?

A. No, Mr. Dardi called me and wanted that released after the question of the Bay City Bank became a moot issue, and I wrote a letter, I believe, to Mr. Clausen, and I signed it, suggesting that the sixteen hundred be released to me and the four hundred be released to Mr. Dardi, and I had intended to sell the sixteen hundred, and that was agreeable to Mr. Dardi, but not with counsel, as I recall.

Mr. Clausen: Counsel has handed me a letter. I

(Testimony of Phillip Barnett.)

don't know the purpose of it, Counsel, because from the witness' testimony this was never signed and sent. [86]

Mr. Robertson: He just testified, Counsel, that Mr. Dardi requested that the four hundred shares he had there be released and that he prepared a letter for your signature, or signature of Blair and himself to release these shares of stock.

Mr. Clausen: Which Blair never signed, that is my point, never signed; therefore, the letter was never of any effect.

Mr. Robertson: That is what he testified to, Blair never signed it.

Mr. Clausen: That's right.

Q. (By Mr. Robertson): Well, I will show you a copy of a letter under date of October 24, 1951, which is unsigned, addressed to Dean Witter and Company, and prepared for the signature of yourself and Blair Holdings Corporation, and ask you if that is the letter you just referred to in your testimony?

A. Yes, that is correct. My recollection is I signed it, but Blair refused to sign it.

Q. You drew that originally at the request of Virgil Dardi?

A. Yes, and that was prior to this litigation.

Q. And at that time, Virgil Dardi was the President of Blair Holdings Corporation?

A. That's correct.

Mr. Robertson: We will offer this letter as Defendant Bay City Bank's next in order, your Honor.

(Testimony of Phillip Barnett.)

Mr. Clausen: To which we object, if the Court please, it is a proposed release from this escrow of the two thousand [87] shares which Blair objected to and never signed.

The Court: Well, the ultimate fact is, we agree on it, he made an offer. I will allow it for that limited purpose. May be admitted next in order.

The Clerk: Defendant's Exhibit H admitted and filed in evidence.

(Whereupon copy of letter dated October 24, 1951, unsigned and addressed to Dean Witter, referred to and more particularly described at Page 87 of this transcript, was received in evidence and marked Defendant's Exhibit H.)

Q. (By Mr. Robertson): Mr. Barnett, directing your attention to this stipulation under date of May 19, 1950, and Paragraph Four thereof, the language states as follows:

“Blair stipulates that an order may be entered discharging that certain bond in action 383427 in the principal amount of \$50,000 put up under order dated February 8, 1949, as ordered by Honorable Milton P. Sapiro, Judge of the Superior Court, requiring Bay City to indemnify Blair in the event that Blair and others, as stated in said order, shall be damaged by reason of the transfer of said stock, upon the condition that E. J. Crofoot in the afore-said litigation agrees to guarantee and to indemnify Blair and does hereby and indemnify Blair and save [88] and hold harmless, Blair, up to the ex-

(Testimony of Phillip Barnett.)

tent of \$15,000, its officers, transfer agents and register agents against any loss, damages or expenses or other liability by reason of the recordation or the transfer or the issuance of new certificates of shares as required by said order, and further agrees to escrow forthwith two thousand shares of Blair stock in the place and stead of said bond, being the said two thousand shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot of approximately \$35,000."

I will ask you if, on behalf of the Bay City Bank, you caused two thousand shares of Blair stock, which was held as security for the note, to be transferred to E. J. Crofoot at that time?

A. No, no.

Q. And I will ask you if E. J. Crofoot to your knowledge ever received two thousand shares of Blair stock from Bay City Bank, an alleged balance existing in the twenty thousand shares put in Dean Witter?

A. No.

Mr. Clausen: I will object. I had in mind your Honor's permission.

Q. (By Mr. Robertson): I will ask you, Mr. Barnett, if pursuant to this escrow stipulation and letter, if two thousand [89] shares on May 26, 1950, were put in escrow in Dean Witter and Company?

A. We only had sixteen hundred, I don't know the dates, but there is nothing mysterious about what occurred.

We had sixteen hundred there and as a courtesy

(Testimony of Phillip Barnett.)

we permitted that to stand, but Virgil Dardi put four hundred in and that made up the two thousand shares.

Q. Now, following——

A. We never put any additional in, just let that ride for the time being.

Q. That was sixteen hundred shares left after the sale of the twenty thousand?

A. That is correct.

Q. Now, the last paragraph of Section Four of the stipulation provides:

“Said two thousand shares of stock shall be left in escrow in the possession of Dean Witter and Company, pending a written order releasing the same on order of Crofoot and Blair, or the order or award of said Arbitrator directing said release.”

First, I will ask you if the Arbitrator rendered any order or award in his award concerning these two thousand shares of stock in escrow in Dean Witter and Company?

Mr. Clausen: Object to that, your Honor, on the ground the award speaks for itself. Your Honor, this question calls [90] for the opinion as to what this paper says, this document. This is the award.

The Court: If he knows, he may answer, and you may cross-examine. I will allow it.

The Witness: No, it didn't, except it absolved the Bay City Bank and Trust Company of any and all of these charges made by Blair.

Mr. Robertson: I will ask you, Mr. Barnett, concerning that part of the stipulation that the two

(Testimony of Phillip Barnett.)

thousand shares shall be released upon the written order of Blair and Crofoot, I will ask you what your understanding at the time of the execution of this stipulation was concerning the release of the said two thousand——

Mr. Clausen: Object to that, only violates—pardon me.

The Witness: Before the escrow——

Mr. Clausen: Pardon me, Counsel.

The Witness: I beg your pardon.

Mr. Clausen: Your Honor, we object to that as calling for the conclusion of the witness, no foundation laid, and violation of the parol evidence rule, asking a witness whom he knows is a lawyer what his understanding of something is when the understanding is expressed in writing.

Mr. Robertson: He is a party to this action, your Honor, a party to this agreement, asking him what his understanding of that word “release” was at the time this stipulation was entered [91] into.

The Court: I will allow it subject to your motion to strike and over your objections.

The Witness: Well, it was only a means or device by which, when the purposes of the bond had been accomplished, the escrow condition would be released, taken off, and then the stock would go to the people who had it, Bay City and Dardi. We had a little difficulty in language. I think Mr. Crofoot had a different view of it than some of us, but that was the purpose, and that was the reason it was put up, wasn't a transfer of title at all. When the pur-

(Testimony of Phillip Barnett.)

poses of the bond had been accomplished why, you just take off the escrow condition.

Q. (By Mr. Robertson): Now, I will ask you, Mr. Barnett, following the entry of this arbitration award, which was in August of 1950, but prior to the determination of that action in the Appellate Court, which was in 1953, did you write to Dean Witter and Company concerning the sixteen hundred shares held in that escrow?

A. I believe I did, yes; not only wrote, but I phoned frequently.

Mr. Clausen: I would object to this letter, your Honor, as including my other grounds, and the ground that it is self-serving, a letter by this witness to Dean Witter and Company on November 14, 1951.

Mr. Robertson: The record shows—— [92]

Mr. Clausen: Self-serving, your Honor, in that he there set forth his contentions regarding his claim to the stock, as being self-serving.

Mr. Robertson: If it please the Court, the record shows that prior to the institution of this suit, which was, I believe, very late in 1951, or the first part of 1952—I believe it was December of 1951—Dean Witter, holding the sixteen hundred shares of the two thousand shares of stock, wrote to each of the parties concerned. They wrote to Blair, they wrote to Bay City Bank, wrote to Mr. Crofoot, Mr. Barnett, and asked them to state what their interest was in said shares of stock.

Now, I am asking Mr. Barnett if he wrote on November 14th, 1951, in reply to that letter of Dean

(Testimony of Phillip Barnett.)

Witter. Now, these were events and letters which took place prior to the institution of this suit, and I think it is relative to the issue raised in these pleadings.

The Court: Objection overruled. He may answer.

Mr. Robertson: I show you this letter, November 14, 1951, copy of which is sent to Dean Witter and under your signature, and ask if you wrote that letter?

A. Yes, I wrote this letter, at least I dictated it in the office and it was typed and I signed it.

Mr. Robertson: And at this time, I would like to read this letter. [93]

(Reading.)

“I have your letter of November 5, 1951, as well as a letter from Pillsbury, Madison and Sutro under date of November 2nd, which refers to the subject matter of two thousand shares of Blair Holdings Corporation stock.

“You will recall that I deposited twenty thousand shares of stock with you subject to my direction in the sale thereof. From this amount we still have a balance with you of sixteen hundred shares, the other four hundred shares being owned by Mr. V. J. Dardi. You have asked the question whether or not I make any claim of these stock certificates, and if so, the basis for my claim.

“May I suggest that you will recall that I was the one that deposited these shares with you for the account of the Bay City Bank of Bay City, Texas,

(Testimony of Phillip Barnett.)

and they are still subject to my direction. In a spirit of compromise, a stipulation was entered into under date of May 19, 1950, whereby the shares were to be released on the signature of the writer and a representative of Blair Holdings Corporation. This did not affect, in any way, the title to the stock and it is our position that we not only claim a right to the sixteen hundred shares, but we own them. [94] I suggest that you communicate with Pillsbury, Madison and Sutro, Attention Mr. Maurice D. L. Fuller, with whom I have been in contact, for further information. I am sending a copy of this letter to him."

We will offer that as Defendant's Bay City Bank and Trust Company next in order.

Mr. Clausen: Your Honor, may my objection run to that, that I announced?

The Court: Objection overruled, subject to motion to strike.

The Clerk: Defendant's Exhibit I admitted and filed in evidence.

(Whereupon letter Barnett to Dean Witter, dated November 14th, and referred to and more particularly described at Page 93 of this transcript, was received in evidence and marked Defendant's Exhibit I.)

Q. (By Mr. Robertson): I will ask you, Mr. Barnett, at the time this stipulation of May 19, 1950, and the escrowing of the four hundred shares of the Dardi stock and the holding of the sixteen hundred

(Testimony of Phillip Barnett.)

shares of the Bay City stock when that arrangement was made, I will ask you was it intended by you to transfer title of those Bay City shares to Mr. E. J. Crofoot, Blair Holdings Corporation, or anyone else?

A. No, no. [95]

Mr. Clausen: We object, your Honor, on the grounds it calls for a conclusion of the witness, violates the parol evidence rule, no foundation laid.

The Court: Objection overruled. He may answer.

The Witness: No, it was not our intent, nor was it the intent or understanding of anybody connected with it.

Q. (By Mr. Robertson): I will ask you from the date of on or about March 1, 1949, the time the shares were deposited with Dean Witter and Company, to the present time, do you know of your own knowledge whether or not the said shares of stock in that escrow have ever been transferred, the title to said shares from Bay City Bank and Trust Company to any other party?

A. They were always in the account of the Bay City Bank and Trust Company from the time the twenty thousand shares were deposited up to the present time.

Mr. Robertson: I don't think I have any further questions of the witness at this time.

The Court: Take the witness.

(Testimony of Phillip Barnett.)

Cross-Examination

By Mr. Clausen:

Q. Mr. Barnett, the times of which you speak in, or rather during the years 1948 and onward, you represented and were attorney, were you, Mr. Barnett, for the Bay City Bank and Trust Company?

A. Yes, as well as other parties. [96]

Q. And the other parties were whom?

A. Bay City Bank and Trust Company, Crofoot—E. J. Crofoot, I think at one time a company that Mr. Crofoot was identified with.

Q. And so that during this period——

A. And myself.

Q. And during this period you were attorney for said same E. J. Crofoot who we have referred to here?

A. As of that time, yes, Mr. Clausen.

Q. And the twenty thousand shares of stock to which you referred, having been referred to as initially in the year 1948, the twenty thousand shares had been, according to your testimony here today, twenty thousand shares that Crofoot had and which he had placed with the Bay City Bank and Trust Company?

A. Yes, prior to any of these proceedings.

Q. Now, the twenty thousand shares of stock Mr. Crofoot had received and had in his possession were twenty thousand shares of stock that he had received from Blair, isn't that correct?

(Testimony of Phillip Barnett.)

A. Well, I think he received what was six hundred thousand shares, or \$600,000—well, that was part of it.

Q. Part of the——

A. Yes, I think he transferred his business to Blair for \$600,000—I may be wrong as to the figures, Mr. Clausen, part of which, when Blair couldn't pay the money, they gave him shares of stock without any restriction on those shares of [97] stock, so he went to the Bay City Bank and Trust Company and borrowed some money and placed twenty thousand shares of that stock for that money, yes, that's correct.

Q. The twenty thousand shares, then, is part of the deal by which Crofoot got a certain amount of stock in connection with the Blair-Crofoot deal, as referred to in the Arbitrator's award?

A. I can't say if it is the identical shares of stock or not, but he did receive shares of stock, and it is my understanding that part of that was pledged.

Q. And that was the twenty thousand shares you placed with the Bay City Bank?

A. Yes, that's correct.

Q. Now, during this time, Mr. Barnett, in 1950, Mr. Crofoot, during that year, at least, was a resident of California, was he?

A. I can't answer that, Mr. Clausen; I don't recall.

Q. Well, in the year, Mr. Barnett, you know this litigation was initiated and that in connection with

(Testimony of Phillip Barnett.)

the Bay City Bank and Trust Company case that there were certain attachments; you recall that you represented Mr. Crofoot also in the Atlantic Basin Iron Works case?

A. Wasn't that after this, Mr. Clausen? I think you're getting the dates mixed up. The first case was this suit——

Q. Not speaking of the first in point of—— [98]

A. (Continuing): Bay City Bank and Trust Company to force your people to transfer the stock. Then after that you came in with some cross-complaints, and the cross-defendants came in with some cross-complaints, and I think one of them was this Atlantic suit, but that was afterwards.

Q. The Atlantic Basin and Iron suits were filed in 1948 or 1949; in any event that was another action.

A. I wish you would look and tell me when it was filed, Mr. Clausen. It seems to me it was filed after this Bay City suit.

Q. Assuming it was, Mr. Barnett, would it have been filed, dated in the year 1949?

A. I don't know, but you ought to know when it was filed.

Q. In any event, tell me, do you recall in that case there was an attachment levied and you yourself, as attorney for Mr. Crofoot, filed papers contending that Mr. Crofoot was a resident?

A. I don't recall, Mr. Clausen. Whatever I did is on the record, and I will stand on it.

(Testimony of Phillip Barnett.)

Q. Now, in the answer——

Mr. Clausen: May I have the pleadings in this case?

Q. (By Mr. Clausen): I show you, Mr. Barnett, a document apparently drawn in your own office, filed in this Court on January 19, 1952, being an answer by E. J. Crofoot, and your signature on Page 2 as attorney for E. J. Crofoot, and his [99] signature on the third page under the verification.

I will ask you when you filed that in this Court?

A. If it's there, we filed it.

Q. All right.

Now, I invite your attention, Mr. Barnett, to Page 2, Lines 9 and 10, where it is stated that certain allegations are denied, except the allegation that E. J. Crofoot is a resident of the City of Sacramento, State of California. Does that refresh your recollection?

Mr. Robertson: Excuse me.

Q. (By Mr. Clausen): Does that refresh your recollection that Mr. Crofoot in the year to which this reference was made was a—that is in the year 1951—was a resident of California?

The Witness: If it states that, of course, that is correct.

Mr. Robertson: Just a minute——

Q. (By Mr. Clausen): Would you look at that, Mr. Barnett, and see whether you can tell me now as to whether in the year 1951 Mr. Crofoot was a resident of the State of California?

Mr. Robertson: I think that answer, Counsel,

(Testimony of Phillip Barnett.)

refers to the residency at the time this particular suit was instituted, because residence had to be stated to show diversity of citizenship. I don't think it refers back to 1951, this is an answer to the present complaint in this suit on file, although I can't quite see the materiality of the question whether or not [100] Mr. Crofoot was a resident in 1950.

Q. (By Mr. Clausen): Can you answer the question?

The Witness: I don't know what you are asking.

Q. (By Mr. Clausen): Whether that allegation and that answer that you yourself filed refreshes your recollection as to whether Mr. Crofoot in 1951 was a resident of the State of California.

A. Well, if it says that here, of course that is a fact as related by him, that he was a resident of Sacramento. I think that is the fact.

The Court: The Court will be advised on what is the purpose of the establishment of that?

Mr. Clausen: The purpose, your Honor, the purpose is that in the year, as your Honor heard this morning, in the year 1951, there were some levies of execution made. I do that to show the residence at that time of Mr. Crofoot.

Mr. Robertson: If it please the Court, the answer of Mr. Crofoot here says, answering Paragraph 2 of the Complaint in this very suit before your Honor now, admits, and so forth and so on, and in the complaint it says Mr. Crofoot is a resident of such and such, and this answer is in answer

(Testimony of Phillip Barnett.)

to the Complaint, it refers to his residency in 1953 at the time this suit was filed.

Mr. Clausen: All right.

Now, Mr.—may I proceed, your Honor. [101]

Q. (By Mr. Clausen): Mr. Barnett, you know this matter—will you refer to your files of the Atlantic Basin Iron Works case, to the allegations of residence in that case which you yourself prepared, and tell me whether in the year 1951, Mr. Crofoot was a resident of California?

A. I can't answer that, Henry, you know that. He moved out here from—let's see, he worked for Blair in New York when—you know all of that; if you will give me the dates, I will tell you, but I don't know.

He moved out to Sacramento sometime and lived up there and I think he is still living up there.

Mr. Clausen: Your Honor, my question is, if Mr. Barnett will do that, we perhaps could stipulate to the fact. In other words, I desire to prove his residence in the year 1951 and I know that Mr. Barnett prepared the papers.

The Court: What was his residence, if you know?

The Witness: Well, all I know, your Honor, is that he originally lived in Texas. He moved to New York and worked for Blair and Company, was their executive vice-president, and he also was the head of the Atlantic Basin and got into some squabble. Then he came, went back to Texas. He came to San Francisco, and then he went up to Sac-

(Testimony of Phillip Barnett.)

ramento where his mother and father lived. The exact dates of that I don't recall. I do know he is a resident of Sacramento now, and I believe he was when this Atlantic Basin suit was filed. What [102] date it is, I don't know.

Mr. Clausen: And the reason, your Honor, I am asking if Counsel will refer to his own files, he has got those files, I can show him the exact place in the file where that statement is set forth as to residence.

Mr. Robertson: If he will state he knows it as a fact that the files disclose he was a resident of California in 1951, we will so stipulate, your Honor.

Mr. Clausen: 1951; very well.

The Witness: Whatever the date is.

Mr. Robertson: I can't see the materiality of this minor question.

Mr. Clausen: That is all.

The Court: That is all; while you are resting, you may step down.

Mr. Robertson: The Bay City Bank and Trust Company and Phillip Barnett, defendants, rest, your Honor. We renew our motion we made this morning for judgment.

Mr. Clausen: I have some evidence.

The Court: Withhold your motion.

Mr. Robertson: Very well.

Mr. Clausen: Your Honor, I desire to put in evidence the disclaimer. I need not take the time of the Court to find it, but it is in the file, by E. J. Crofoot.

The Court: Hand him the file, get a record on it. [103]

Mr. Clausen: I put in evidence, your Honor, the answer filed by E. J. Crofoot in this proceeding, January 25, 1952, and I invite the attention of the Court to the particular portion that I have in mind where it reads as follows, a statement by Mr. Crofoot:

“* * * defendant E. J. Crofoot further states that he claims no right, title or interest in or to any of said two thousand shares of Blair Holdings Corporation stock presently held by Dean Witter and Company for the account of Bay City Bank and Trust Company, and that a letter to this effect was addressed to plaintiff on November 27, 1951.”

With that, your Honor, we make the same motion, your Honor, in respect to the case presented by the Bay City Bank and Trust Company and Barnett to the effect that they have not proved their right to this stock. I have this to suggest: These short excerpts, your Honor, of testimony that have gone before the Court are tied in at various places to the evidence that has been received by the Court. I should like very much, your Honor, to demonstrate our position, our position that we are entitled, your Honor, to have that stock, that Blair have the stock, or in the event that Blair does not have title to the stock, that we are entitled to have compliance with the contract, the signed stipulation, and that the signatories to that signed stipulation, the Bay City Bank and Trust Company, [104] Crofoot and all the rest are estopped, your Honor, from claiming that that two thousand shares of stock should not be

hypothecated or placed or put up, or whatever be the legal position as set forth in that document.

I represent a corporation which, in good faith, accepted the stipulation on the statements therein set forth, and therefore I would like to detail what I have as the basis for so claiming in writing and at the same time, your Honor, to detail my own motions to strike if the Court would permit that to be done in writing.

The Court: Well, in order to clear it up, in order to dispose of the matter on the merits, the motions of both sides will be denied.

Mr. Robertson: Very well, your Honor.

The Court: So that the matter can be disposed of on the merits.

* * *

[Endorsed]: Filed September 29, 1954. [105]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint.

Injunction pendente lite.

Disclaimer.

Answer of Bay City Bank & Trust Co., & Phillip Barnett.

Answer of E. J. Crofoot.

Notice of motion to dismiss.

Answer of Blair Holdings Corp., et al.

Notice of motion for judgment for interpleader, etc.

Affidavit of Donald G. McNeil.

Order discharging plaintiffs from liability, etc.

Order denying motion to dismiss.

Judgment filed Jan. 15, 1953.

Proposed modifications to judgment.

Amendments to notice of motion for modification of judgment.

Notice of motion for modification of judgment.

Order for entry of judgment.

Objections to and proposed modification of proposed findings of fact, conclusions of law and judgment.

Affidavit of J. H. Marden.

Objections to and proposed modification of proposed findings of fact, conclusions of law and judgment.

Findings of fact and conclusions of law.

Judgment.

Affidavit of Phillip Barnett supporting order to show cause.

Order to show cause.

Substitution of attorneys.

Affidavit of D. A. Hughes upon order to show cause re contempt.

Notice of appeal to the Court of Appeals.

Cost bond on appeal.

Appellant's designation of record.

Defendant Blair Holding Corp. Exhibits 1-B through 12-B.

Defendants Bay City Bank & Trust Co. and Phillip Barnett Exhibits A through I, inclusive.

Reporter's transcript of trial, June 9, 1954.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of October, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14552. United States Court of Appeals for the Ninth Circuit. Blair Holdings Corporation, a Corporation; Blair-Rollins & Co., Incorporated, a Corporation, and Blair & Co., Inc., of New York, a Corporation, Appellants, vs. Bay City Bank and Trust Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14552

BLAIR HOLDINGS CORPORATION, a Corpora-
tion, et al.,

Appellants,

vs.

DEAN WITTER, et al.,

Appellees.

APPELLANTS' STATEMENT OF POINTS
ON APPEAL

To the Honorable Chief Justice and Associate
Justices of the United States Court of Appeals
for the Ninth Circuit:

Appellants respectfully state that the following
are the points upon which they intend to rely on
appeal:

1. The trial court erred in declaring Bay City
Bank and Trust Company to be the owner in fee of
1600 shares of Blair Holdings Corporation stock on
deposit in Court.

2. The findings of fact relative to title to the
1600 shares of Blair Holdings Corporation deposited
in Court are not supported by the evidence.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Appellants.

[Endorsed]: Filed January 3, 1955.

No. 14,552

IN THE

United States Court of Appeals
For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation;
BLAIR-ROLLINS & Co., INCORPORATED, a Corporation and
BLAIR & Co., INC., OF NEW YORK, a Corporation,

Appellants,

VS.

BAY CITY BANK AND TRUST COMPANY,
a Corporation,

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANTS.

MARSHALL E. LEAHY,

JOHN F. O'DEA,

1258 Russ Building, San Francisco 4, California,

Attorneys for Appellants.

FILED

MAR 22 1955

PAUL P. O'BRIEN, CLERK

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No. 14,552

IN THE
United States Court of Appeals
For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation;
BLAIR-ROLLINS & Co., INCORPORATED, a Corporation and
BLAIR & Co., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY,
a Corporation,

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

Dean Witter & Co., a security brokerage firm, filed in the District Court of the United States for the Northern District of California, Southern Division, an action in interpleader relative to 2000 shares of Blair

Holdings Corporation on deposit with Dean Witter & Co. The shares had been received by Dean Witter & Co. pursuant to certain escrow instructions contained in the following letter and the following stipulation attached thereto:

Law Offices
Phillip Barnett
2810 Russ Building
San Francisco 4
GARfield 1-5108

May 26, 1950

Dean Witter & Co.,
45 Montgomery Street,
San Francisco, California

Attention: Mr. Cronin.

Re: Bay City Bank and Trust Company
Gentlemen:

You are hereby instructed that you shall hold in escrow 2,000 shares of Blair Holdings Corporation stock at no expense to Blair Holdings Corporation, identified by certificate numbers 6201 to 6216, representing 100 shares each and certificates numbers SH 10652, S 13739, N 3931 and NH 1736, representing 100 shares each.

Said escrow is pursuant to that certain stipulation, copy of which is attached hereto, dated May 19, 1950, and which stipulation is in connection with litigation now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, Number 383427, involving Bay City Bank and Trust Company, a corporation, and Blair Holdings Corporation, a corporation.

You shall release these shares in accordance with the provisions contained in said stipulation.

Yours truly,
 /s/ Phillip Barnett
 Blair Holdings Corporation
 By /s/ Henry C. Clausen

In the Superior Court of the State of California,
 in and for the City and County of San Francisco

No. 383427

Bay City Bank and Trust Company, a Corporation,	} Plaintiff,
--	--------------

vs.

Blair Holdings Corporation, a Corpo- ration, et al.,	} Defendants.
---	---------------

Stipulation

This stipulation is entered into this 19th day of May, 1950, between Bay City Bank and Trust Company, a corporation, referred to as Bay City, and Blair Holdings Corporation, a corporation, referred to as Blair, parties to the above litigation now pending and being presently heard before Mr. George Osborne, Arbitrator, pursuant to Arbitration Agreement dated March 6, 1950, be-

tween above parties and others whose signatures hereto are necessary so as not to affect the terms and conditions of the aforesaid Arbitration Agreement in any particular except to effectuate the purpose and intent of this agreement.

1. Plaintiff Bay City hereby dismisses with prejudice the above-named action against Blair, Jean Lambert, Frank Reed and Virgil D. Dardi, among other things, to enforce the transfer of 20,000 shares of stock held by it as collateral and which transfer has already been effected upon the placing up of a bond.

2. Blair dismisses with prejudice its counterclaim and cross-complaint against Bay City on all causes of action in the action above against said Bay City but reserves and retains as against Crofoot and Rice and Crofoot or Rice all rights and remedies which Blair would otherwise have against Bay City or which may be asserted against Crofoot and Rice or Crofoot or Rice through said Bay City, as agreed to be arbitrated.

3. Blair and Bay City hereby release the other of them and their respective directors, officers, employees, agents and attorneys from any and all claims of every kind and character and description arising out of or incidental to the aforesaid litigation and any litigation now being arbitrated as aforesaid and any transaction described in said litigation and the matters therein set forth excepting as herein specifically reserved and otherwise provided for.

4. Blair stipulates that an order may be entered discharging that certain bond in Action

383427 in the principal amount of \$50,000.00 put up under order dated February 8, 1949, as ordered by Honorable Milton T. Sapiro, Judge of the Superior Court, requiring Bay City to indemnify Blair in the event that Blair and others, as stated in said order, shall be damaged by reason of the transfer of said stock, upon the condition that E. J. Crofoot in the aforesaid litigation agrees to guarantee and to indemnify Blair and does hereby guarantee and indemnify Blair and save and hold harmless Blair, up to the extent of \$15,000.00, its officers, transfer agents and register agents against any loss, damages or expenses or other liability by reason of the recordation or the transfer or the issuance of new certificates of shares as required by said order, and further agrees to escrow forthwith 2,000 shares of Blair stock in the place and stead of said bond, being the said 2,000 shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot of approximately \$35,000.00. Said 2,000 shares of stock shall be left in escrow in the possession of Dean Witter & Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release.

5. Nothing in this agreement or stipulation shall in any way alter or amend in any respect the terms or conditions of that written Arbitration Agreement between other parties hereinabove referred to except as herein stated, and E. J. Crofoot and Blair each reserves the right to assert against the other all claims for costs and expenses incurred herein and to which Bay City or

Blair may be entitled as a result of the action between these parties in this agreement and the Arbitrator shall award to Blair or Crofoot, respectively, such damages incurred by Blair or Bay City (through Crofoot) in their action against the other as may have been heretofore provided by said Arbitration Agreement, and Bay City shall be considered withdrawn from said arbitration.

In witness whereof, each of the parties hereto have signed their name this 19th day of May, 1950.

Parties to the Agreement:

Blair Holdings Corporation,

By

Bay City Bank and Trust Company,
By /s/ P. R. Homill, President.

I agree to Guarantee as Provided in Paragraph 4.

/s/ E. J. Crofoot.

We, the undersigned, parties to the Arbitration Agreement dated March 6, 1950, hereby consent and agree that the Arbitration now being heard by Mr. George Osborne, pursuant to that written Arbitration Agreement dated the 6th day of March, 1950, shall continue in any and all respects as between us, and the aforesaid mutual releases and stipulation herein contained, shall not affect, alter, modify or in any way change the terms and conditions of said Arbitration Agreement, except as provided above. We hereby con-

sent and agree that said Arbitration shall continue in full force and effect.

Blair Holdings Corporation,
New York City, New York

By

Blair-Rollins & Co., Incorporated,
Russ Building, San Francisco

By

Blair & Co., Inc., of New York,
Russ Building, San Francisco

By

Bay City Bank and Trust
Company,
C/O Phillip Barnett, Russ Bldg.,
San Francisco, California

By /s/ P. R. Homill, Pres.;

/s/ E. J. Crofoot

/s/ Paul Rice

.....

.....

.....

.....

Directors.

Approved by Counsel:

/s/ Phillip Barnett

Keesling & Keesling,

Henry L. Clausen.

The stipulation was executed in counter-part with the result that all parties indicated as signatories have subscribed.

The litigation referred to in the foregoing letter as No. 383427 was a suit instituted by Bay City Bank and Trust Company against Blair Holdings Corporation to compel the transfer upon the books of Blair of 20,000 shares of Blair Holdings Corporation. A cross-complaint filed in such action by Blair Holdings Corporation brought in E. J. Crofoot and Paul Rice as additional parties defendant and alleged that the shares sought to be transferred had previously been owned by Blair Holdings Corporation and had been transferred to Crofoot and Rice in reliance upon fraudulent misrepresentations made by such parties. The cross-complaint prayed for a rescission of the Crofoot and Rice transactions and alleged that the shares sought to be transferred had been received by Bay City Bank by way of pledge from Crofoot, with full knowledge of the facts. In such action an order was made on February 8, 1949 by the Honorable Milton D. Sapiro directing the transfer of the shares upon indemnification of Blair by Bay City Bank in the form of a bond in the principal amount of \$50,000. When such action together with five other pending proceedings involving Blair Holdings Corporation and Crofoot and Rice were referred to arbitration the stipulation above set forth was entered into. As it recites mutual dismissals were executed between Blair and Bay City Bank, reserving however, all rights and remedies between the real parties in interest, Blair and Crofoot and Rice. Pursuant to such stipulation the indemnification bond which Bay City Bank had given in accordance with the order of Feb-

ruary 8, 1949 was discharged and the indemnification of Blair for having transferred 20,000 shares was assumed by Crofoot. As the stipulation recites, Crofoot deposited in the escrow account 2,000 shares of Blair Holdings Corporation. The stipulation states that the shares so deposited were shares which had been held by Bay City Bank as collateral for an obligation of Crofoot and which were relinquished to Crofoot by such bank after the loan had been paid from the proceeds of the sale of other shares. The testimony discloses that only 1,600 of such shares had actually been so relinquished to Crofoot by the bank and that 400 of such shares had been loaned to Crofoot by Blair or by Virgil Dardi the then president of Blair Holdings Corporation in order to permit Crofoot to make the deposit in escrow. There is no controversy as to the ruling of Court respecting the disposition of the 400 shares. The 1,600 shares in question held by Dean Witter & Co. in the escrow account stood in "street name".

The interpleader action was prompted by conflicting demands made upon Dean Witter & Co. for delivery of the shares. The first of such demands was a levy of execution made on September 11, 1951 by the Sheriff of the City and County of San Francisco on behalf of Blair Holdings Corporation by virtue of a judgment obtained by Blair against E. J. Crofoot. The levy was upon all monies, credits, effects, debts due and owing E. J. Crofoot.

The second demand was made on November 14, 1951 in the form of a letter from Phillip Barnett

making a claim for 1,600 shares and purporting to do so as attorney for and on behalf of Bay City Bank and also upon his own behalf.

Judgment of Interpleader was entered and the shares were deposited in Court. Trial of the action was had and decision rendered by the Honorable Michael J. Roche declaring Bay City Bank and Trust Company to be the owner in fee of the 1,600 shares of Blair Holdings Corporation.

Blair Holdings Corporation and two Blair subsidiary corporations have appealed from the decision.

SPECIFICATION OF ERRORS.

I. The trial Court erred in declaring Bay City Bank and Trust Company to be the owner in fee of 1,600 shares of Blair Holdings Corporation stock on deposit in Court. The record is clear that Bay City Bank and Trust Company received the said shares by way of pledge from E. J. Crofoot. The law is clear that a pledgee does not take title to property pledged with him, his interest being merely a lien and possession for a limited purpose. Nor does a default in the payment of the obligation secured by the pledge pass title to the pledgee. If any right to the shares remained in Bay City Bank upon the conclusion of proceedings below it was but the same limited right which it previously held and could only be exercised by a foreclosure or sale of the shares to satisfy the unpaid balance of the obligation, with the

excess of the proceeds of sale payable to the pledgor. However the pledgee for good and valuable consideration had relinquished its lien and had by written agreement placed the shares in escrow to be disposed of in accordance with the escrow agreement. The written agreement of the parties is unequivocal and the acceptance of oral testimony contradictory of such agreement is a violation of the parol evidence rule as a matter of substantive law.

II. The findings of fact relative to title to the 1,600 shares of Blair Holdings Corporation deposited in Court are not supported by the evidence.

ARGUMENT.

I. THE TRIAL COURT ERRED IN DECLARING BAY CITY BANK AND TRUST COMPANY THE OWNER IN FEE OF 1600 SHARES BLAIR HOLDINGS CORPORATION.

The manner in which Bay City Bank came into possession of the 20,000 shares of Blair Holdings Corporation is uncontradicted in the record. A promissory note dated 9-16-48 payable to Bay City Bank and Trust Company in the amount of \$35,000 had been secured by a pledge of such shares. (Tr. p. 94.) The source of these shares was E. J. Crofoot. (Tr. p. 97.)

The legal effect of such pledge upon the title to the shares is stated generally in 41 Am. Jur. 603 (§27).

“By the contract of pledge, the pledgor does not part with his general right of property in the

collateral. The general property therein remains in him, only a special property vests in the pledgee. The pledgee does not acquire an interest in the property except as a security for his debt."

The law of Texas which would seem to be applicable to the transaction is precisely the same as that above quoted. (*San Angelo Hilton Hotel v. B. B. Hail Bldg. Corp.*, 60 S.W. (2d) 1049.) In *Locketts v. Townsend* (3 Tex. 119) it was held that a pledge does not pass the general property to the pledgee but the possession and use only and that a stipulation that title should become absolute in the pledgee upon default is void.

The law of California should such obtain is equally clear that upon the pledge of shares for a debt, the legal title thereto as between the pledgor and pledgee remains in the former (*Cross v. Eureka Lake, etc.*, 73 C. 302).

It is, therefore, obvious that fee title was never in Bay City Bank.

The shares in question were delivered to Dean Witter & Co. in conjunction with 18,400 additional shares, constituting the block of 20,000 shares which was forwarded by Bay City Bank to be sold for the account of such Bank. The fact that the shares were transmitted to the brokerage firm through Wells Fargo Bank (Tr. p. 52) is not material. The only possible effect of the delivery of the shares to Dean Witter & Co. was to make such firm the agent of Bay

City Bank for the purpose of sale. This would not disturb the legal title in E. J. Crofoot.

Dean Witter & Co. pursuant to instructions sold 18,000 shares and deposited the balance of the proceeds \$35,239.96 (Tr. p. 55) to the account of Bay City Bank with the Wells Fargo Bank. (Tr. pp. 59 and 98.) A dividend payment on 2,000 shares (\$300.00) was also received by Dean Witter & Co. (Tr. p. 55) and presumably the amount was credited to Bay City Bank. By such sales and credits the promissory note payable to Bay City Bank was satisfied. Any collateral remaining in the possession of the bank or its agent was the property of the pledgor—free of the lien of pledge unless some further obligation was secured by such lien. Payment of the debt extinguishes the lien. (*Cross v. Eureka Lake, etc.*, 73 C. 302.)

The basis of the claim of Bay City Bank and/or Phillip Barnett upon the shares remaining in the possession of Dean Witter & Co. is not clear. It would appear to be stated at page 92 of the transcript:

“Mr. Robertson: . . . I want to develop Mr. Barnett’s claim here in this stock arrangement that he had with the bank, that the balance of shares not needed to liquidate this note would be for his retainer fee, for services rendered.”

Apparently the bank and Barnett had agreed to a disposition of shares which neither of them owned. Obviously if there was any legal claim against the balance of the collateral for the payment of an at-

torney's fee it would have to be found in the provisions of the promissory note. The applicable provisions of the note are the following:

“And if default is made in the payment of this note at its maturity and it is placed in the hands of an attorney for collection or suit is brought on same a sum equal to 10% of the principal and interest hereof shall be added to such principal and interest as attorney or collection fee but in no event shall such attorney or collection fee be less than \$10.00.”

Such provisions certainly do not authorize the conduct which we have here encountered. They are but the usual undertaking to pay an attorney's fee if by failure or refusal of the maker to discharge his obligation it becomes necessary for the payee to place the matter in the hands of an attorney for collection. That contingency does not exist in this situation. The record indicates that Crofoot cooperated with the payee and authorized the sale of the collateral to pay off the note. The most that he is chargeable with is the cost of sale. The fact that the transfer agent unjustifiably refused to transfer the shares and had to be compelled by Court order was no doing of Crofoot. The action to compel transfer was not the type of action contemplated by the attorney's fee provision of the note. Furthermore the note is not self-determining as to the amount of a fee if one should be warranted. It prescribes a maximum and a minimum which is an obvious indication that the parties contemplated the fixing of the fee by a Court. The fairness of any attorney's fee prescribed is likewise

always a subject for inquiry of Court. No such procedure was here followed. Attorney Barnett merely decided that 1,600 shares of Blair Holdings Corporation were an adequate fee. At present market such shares have a value of \$8,200.00. (It should be borne in mind that if a pledged security increases in value the pledgor is entitled to the benefit of the increase. 41 Am. Jur. 604.)

Even should the agreement embodied in the note relative to attorney's fee have been applicable and definite as to amount, confiscation of the shares was not the proper manner of enforcing the lien. Sale of the shares under foreclosure proceedings or under a power of sale, were the only methods by which the title of the pledgor could be divested. And in such event any amount over and above the precise obligation secured by the lien was the property of the pledgor and was returnable to him. The Court below failed to inquire as to the basis for any further claims against the shares over and above the loan, or the extent of such claim or to require any accounting of the shares or of the proceeds of the sale of the shares, if they have been sold by Bay City Bank or Phillip Barnett.

Appellants contend that the proceedings below fail to recognize the nature of a pledge transaction or to comply with legal procedures as to the enforcement of a pledge lien, if any did exist with respect to the 1,600 shares after payment of the note obligation. In addition to the points thus raised appellants urge that the Court failed to properly construe the agree-

ment of the parties. When read and correctly interpreted the stipulation executed by Bay City Bank was as to such party a waiver of any right which it may have had in or to the 1,600 shares. Such agreement of waiver was supported by adequate consideration.

The stipulation was an adjunct of arbitration proceedings entered into for the purpose of resolving six legal actions which were pending between Blair Holdings Corporation and E. J. Crofoot and Paul Rice as principal parties. One of the actions incorporated into the arbitration proceedings was that of Bay City Bank and Trust Company v. Blair Holdings Corporation #383427 in the Superior Court of the State of California in and for the City and County of San Francisco. By such action Bay City Bank had sought to compel the transfer on the books of the corporation of 20,000 shares Blair Holdings Corporation which had been pledged to the bank by Crofoot. To such complaint Blair Holdings Corporation filed a cross-complaint bringing in new parties, Crofoot and Rice, as cross-defendants. The cross-complaint alleged that the shares sought to be transferred had been the property of Blair and had been obtained by Crofoot and Rice through fraudulent misrepresentations. It sought a rescission of the transaction by which the shares had passed from Blair to Crofoot and Rice. It alleged that Bay City Bank had received the shares from Crofoot, with knowledge of the fraudulent transaction. In such action an interlocutory order was made by the Honorable Milton D.

Sapiro directing Blair to transfer the shares in question upon proper indemnification by Bay City Bank. Such order dated February 8, 1949 required a bond in the principal amount of \$50,000.00. As the arbitration award witnesses, the charges of fraud against Crofoot and Rice were well founded and consequently Bay City Bank was involved in a substantial law suit. It also stood liable as a principal on the indemnification bond. All parties however realized that the real controversy existed between Blair and Crofoot and Rice. In recognition of such fact the stipulation in evidence was executed. It constitutes a release of Bay City Bank. "Bay City shall be considered withdrawn from said arbitration." (Tr. p. 14.) Mutual releases were given by Blair and Bay City. Crofoot undertook the obligation of the indemnification of Blair for having transferred the shares "... upon the condition that E. J. Crofoot in the aforesaid litigation agrees to guarantee and indemnify Blair . . ." (Tr. p. 13.) In fact Crofoot was even required to pay the premium on the bond which Bay City had given. (Tr. p. 86.) Undeniably Bay City Bank received real consideration in the releases from complex litigation which it obtained through the execution of the stipulation. Such consideration was more than adequate to support a waiver of any rights which it may have held to the 1,600 shares remaining in the possession of Dean Witter & Co.

By its execution of the stipulation Bay City Bank subscribed to the statement that the shares escrowed with Dean Witter & Co. were "the said 2,000 shares

of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot . . .” (Tr. p. 13.) Such acknowledgment is a complete waiver and release of whatever rights Bay City might have still held in the shares remaining after satisfaction of the loan. It is a full consent to permit Dean Witter and Co. to release the shares from the agency account and to hold them in the escrow account in accordance with the escrow instruction. There is a finding in the record that these shares stood in “street name”. (Tr. p. 36.) In such event no further endorsements were required even to transfer title to the shares, let alone to release a mere lien.

“A certificate of stock in ‘street name’ means a certificate issued in the name of an individual and endorsed in blank by him, so that the certificate passes from person to person without any further endorsement by any one else.” *Drake-Jones Co. v. Drogseth*, Minn., 246 N.W. 664.

The stipulation is a clear and unequivocal statement of the agreement of the parties. It was designed to confine the proceedings to the real parties in interest and to permit the withdrawal of Bay City Bank. By its terms action 383427 is dismissed. Bay City and Blair give mutual releases and “Bay City shall be considered withdrawn from said arbitration”, the bond in action 383427 is discharged “upon the condition that E. J. Crofoot agrees to guaranty and to indemnify Blair” * * * “. . . and further agrees to escrow forthwith 2,000 shares of Blair stock in the place and stead of said bond, being the said 2,000

shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot . . .” The stipulation further provides: “Said 2,000 shares of stock shall be left in escrow in the possession of Dean Witter & Company, pending a written order releasing the same on order of Crofoot and Blair or the order or award of said arbitrator directing said release.”

The stipulation is not susceptible of misconstruction. No explanation is necessary and no amount of explanation could convince one that it does not mean what it says. Yet the Court below permitted oral testimony not merely to explain but to contradict the written agreement. It would be difficult to find a more flagrant violation of the parol evidence rule, considering the rule not as a canon of evidence but as a declaration of substantive rights.

The state of the record from what has been considered by the foregoing arguments leaves no room for dispute as to an interest of Crofoot in the 1,600 shares, be that interest free and clear of any lien of Bay City as the written waiver so agrees, or be it a right to the excess proceeds remaining after the proper exercise of any lien of the pledge agreement. Unless this Court countenances the confiscation which was permitted below Crofoot had an interest which was subject to a levy. The law of Texas is explicit as to the propriety of a levy upon the interest of a pledgor: Vernon's Texas Rules of Civil Procedure §643:

“Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, or complying with the conditions of the pledge, assignment or mortgage.”

There is no question as to the existence of a claim against Crofoot by Blair. The judgment confirming the award of the arbitrator is in evidence. (Tr. p. 78.) There is no question but that Blair effected a proper levy upon the interest of Crofoot. Counsel for Bay City and Barnett raises only the issue as to the interest of Crofoot:

“Mr. Robertson: If this stock in Dean Witter is Crofoot’s then they can execute on it. That is the whole issue. We say it is not Crofoot’s.” (Tr. p. 85.)

Appellants contend that by appropriate levy Blair has reached the interest of Crofoot which was never divested.

In the light of all of the foregoing the legal conclusion arrived at below that Bay City Bank and Trust Company is the owner in fee of the 1,600 shares is completely untenable. Such decision is also contrary to the very agreement of the parties that the shares were to be released from escrow upon the written order of Crofoot and Blair or the order or award of the Arbitrator directing the release. The Arbi-

trator made no order of release and apparently made no specific award relative to the shares, the net result of his decision being money judgments in favor of Blair and against Crofoot and Rice. The answer of E. J. Crofoot (prepared and signed incidentally by Phillip Barnett) disclaims any interest in or to the shares. By the very agreement of all parties therefore the shares were subject to the order of Blair solely. Such right of disposition was in addition to any right it had created by levy of execution.

The result reached in the Court below is in contravention of any applicable principle of law.

II. THE FINDINGS OF FACT RELATIVE TO TITLE TO THE 1600 SHARES OF BLAIR HOLDINGS CORPORATION DEPOSITED IN COURT ARE NOT SUPPORTED BY THE EVIDENCE.

The Court below made two findings relative to title to the 1,600 shares of Blair Holdings Corporation which are the subject of this controversy. The findings are numbered 8 and 10. Each is unsupported by the evidence in the record.

Finding number 8, while rather loose in its first two sentences, is principally objectionable in its concluding sentence:

“That neither Bay City Bank nor Phillip Barnett executed any assignment, endorsement or other instrument for the purpose of transferring title to said 1,600 shares of stock and it was not intended by Bay City Bank, Phillip Barnett nor the Blair Parties that title to said stock should

be transferred at the time said stock was es-crowed.”

The finding first assumes something not in evidence, namely, that title to the shares was in either or both Bay City Bank and Phillip Barnett. We have confuted this false assumption in the first portion of our brief considering the matter as one of law. Factually the only evidence is that the shares were pledged by Crofoot. The legal effect of such transaction would be to leave title in Crofoot.

The finding then ignores the evidence that the shares were in street name (and finding number 5 to such effect). By stating that neither Bay City nor Barnett had executed any assignment, endorsement or other instrument for the purpose of transferring title the finding evidences an unawareness of the legal effect of placing shares in “street name”. The same disaffirmance of the execution of any instrument for the purpose of transferring title is contrary to the evidence of the execution of the stipulation. While technically the agreement embodied in the stipulation transferred no “title” it did constitute a waiver of any lien which Bay City might have retained in the shares.

Finding 10 is wholly objectionable, incorrect and contrary to the evidence. It states:

“10. It is a fact that from March 5, 1949 (the date Bay City Bank acquired title to the 20,000 shares of Blair stock as hereinabove stated), to the present time, title to the said 1,600 shares of stock on deposit with Dean Witter & Co. has

never been transferred by Bay City Bank or Phillip Barnett and that the said Dean Witter & Co. held said 1,600 shares of stock at all times for the account of Bay City Bank."

The record is uncontroverted that Bay City Bank never did acquire title to the shares but received them as a pledgee and that no legal proceedings were ever had to disturb the legal title of E. J. Crofoot. The same points raised above relative to the denial of a transfer of interest by Bay City or Barnett are also applicable to this finding.

It should be further noted that both of the objectionable findings are conclusions of law—incorrect conclusions.

Appellants therefore urge that this Honorable Court for the reasons assigned reverse the judgment of the Court below.

Dated, San Francisco, California,
March 16, 1955.

Respectfully submitted,

MARSHALL E. LEAHY,

JOHN F. O'DEA,

Attorneys for Appellants.

No. 14,552

IN THE

United States Court of Appeals
For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation;
BLAIR-ROLLINS & Co., INCORPORATED, a Corporation and
BLAIR & Co., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY,
a Corporation,

Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

APPELLEE'S REPLY BRIEF.

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Appellee.

Appeal from the United States District Court,
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APPELLEE'S REPLY BRIEF.

STATEMENT OF FACTS.

Appellants' opening brief, although filed earlier, was through inadvertence not served upon the Appellee until August 15, 1955. This brief was prepared, served and filed within thirty-five days of receipt of service of the Appellants' opening brief.

The Appellee herein has no objection to interpose as to pages one through seven of the opening brief

of Appellants since it involves simply the reproduction of a certain letter and stipulation. However, the Appellee does seriously contest the factual statement, specification of errors, and argument contained in pages eight through twenty-two of Appellants' opening brief.

The ultimate facts established in the record of this action are that Dean Witter & Co., a stock brokerage firm, interpleaded 2,000 shares of Blair stock into the Court below as a result of a dispute concerning the ownership of said stock involving Blair Holdings Corporation and Virgil D. Dardi on the one hand, and Bay City Bank & Trust Company and Phillip Barnett on the other hand.

The issues presented to the lower Court are well summarized by the pleadings submitted by the parties.

These issues are summarized as follows:

(1) Bay City Bank and Phillip Barnett contend (and the lower Court so found) that they are entitled to the 1600 shares of stock since legal title to said stock was in the name of the bank;

(2) E. J. Crofoot claimed no interest whatsoever in the stock;

(3) Blair claimed they ought to get the stock because it was either awarded to them in a judgment or award of an arbitrator, or because they had levied a writ of execution on E. J. Crofoot at Dean Witter & Co.

The evidence developed the following facts conclusively. That only 1600 shares of stock herein were in

dispute, it being admitted by Appellee that the other 400 shares of said stock belong to Virgil D. Dardi. As to the 1600 shares of Blair Holding Stock, the title to same was traced from the beginning.

On September 16, 1948, the Bay City Bank & Trust Company loaned E. J. Crofoot and the Tuckerman-Rice Milling Company \$35,000.00, evidenced by a promissory note, which is Defendant's E in evidence. This note was secured by a pledge of 20,000 shares of Blair Holdings Corporation stock, at that time standing in the name of E. J. Crofoot. The note provided that in the event of a default, the bank had the right to sell said stock and in addition to the payment of the principal and interest then due, to pay attorney fees equal to 10% of the principal and interest then due on the note and other costs, and to apply any proceeds over and above said amounts to any other indebtedness owed by the makers of the note to the bank. (See Dfts. E.)

In the latter part of 1948, Crofoot and the Tuckerman-Rice Mill were unable to pay said loan and the Bay City Bank & Trust Company retained Phillip Barnett to secure the transfer of the pledged stock, to cause same to be sold, and thereby liquidate said loan. Pursuant to the terms and conditions of the note, and the retainer agreement between the Bank and Phillip Barnett, 10% of the said stock was to apply towards the cost of sale of said stock, attorneys fees incurred in causing the same to be transferred from the name of E. J. Crofoot to the name of Bay City Bank & Trust Co. (See Tr. of Record pp. 90-94.)

Phillip Barnett presented said stock to Blair Holdings Corp. for transfer and they refused to transfer same. He thereupon instituted a suit and on February 8, 1949, secured an order of the Superior Court of the State of California, In and For the City and County of San Francisco, in Action No. 383,427, ordering Blair Holdings Corporation to transfer the said 20,000 shares of stock to such party nominated by the Bay City Bank & Trust Company, upon the posting of a \$50,000.00 bond. (See Dfts. Ex. 7-B.) The said \$50,000 bond was posted. (Plts. 8-B.)

On March 5, 1949, Blair Holdings Corporation transferred the said 20,000 shares of stock from the name of E. J. Crofoot to the name of Bay City Bank & Trust Company and issued their invoice under said date of March 5, 1949, evidencing this transfer. (See Dfts. Ex. A.)

At the time the certificates were pledged to the Bank by Crofoot, they bore Blair Holding Corporation Certificate Nos. NHS 433, NHS 434, NHS 435 and NHS 436, each certificate being in the amount of 5,000 shares and standing in the name of E. J. Crofoot.

On March 5, 1949, those certificates were surrendered and the Blair Holdings Corporation, pursuant to Court order, issued four new certificates in the name of Bay City Bank & Trust Company, in the amount of 5,000 shares each being certificates No. SHF 2805, SHF 2806, SHF 2807, SHF 2808. (Dfts. Ex. A; Tr. of Record pp. 51-53.) The transfer was made to liquidate the loan including Court costs and attorney fees.

Defendants' Exhibit G demonstrates that prior to March 11, 1949, Phillip Barnett had received the four certificates of 5,000 shares each which had been transferred by Blair Holdings Corporation to Bay City Bank & Trust Company. That he had on March 11, 1949, transmitted Certificates 2806, 2807 and 2808 to Dean Witter & Co. with instructions to sell on his order and to deposit the proceeds in the Wells Fargo Bank to the credit of the Bay City Bank & Trust Company, and that powers of attorney to transfer would be forwarded by Bay City Bank shortly. The letter also referred to the fact that Certificate 2805 in the amount of 5,000 shares, standing in the name of Bay City Bank & Trust Company had been previously transmitted to Dean Witter & Co. on March 9, 1949, with the same instructions.

The evidence and the documentary exhibits (Dfts. 7-B, 8-B, A, F and G) conclusively establish the fact that on March 5, 1949, the 20,000 shares of stock which had previously stood in the name of E. J. Crofoot was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company and that title to said stock remained in the name of Bay City Bank & Trust Company subject to the order of Philip Barnett, with the proceeds thereof to be deposited with the Wells Fargo Bank & Trust Company for the order of Bay City Bank & Trust Company.

The customer ledger sheet of Dean Witter & Co., account No. 5000-2256—1-32, demonstrates that from March 10, 1949, through March 16, 1949, all but 1600 shares of the Bay City Bank stock was sold by Dean

Witter & Co. upon the order of Phillip Barnett, and that said stock was carried in the name of Bay City Bank and for the account of Bay City Bank at Dean Witter & Co. (Tr. of Record pp. 55-59.)

The evidence demonstrates that the mechanics for the sale of the 20,000 shares of stock placed in Bay City Bank's name were that the stock was put into Dean Witter & Co. for sale upon the order of Phillip Barnett as to the time to effect sales and the amount of stock to be sold. That stock powers and resolutions authorizing the endorsement of the stock sold were sent to the Wells Fargo Bank & Trust Company by the Bay City Bank and that the Wells Fargo Bank did endorse the stock sold, based upon said stock powers and resolutions. (Dfts. Ex. A.) That when Dean Witter received the funds from the sale of said stock, that company did turn the proceeds over to Wells Fargo Bank, who in turn delivered them to Bay City Bank. The record further demonstrates that in the sale of the stock from March 10, 1949, through March 16, 1949, that the market price on said stock was depressed from a high of \$2.25 a share to a low of \$1.50 a share. (Tr. of Record p. 99.) Mr. Barnett testified that the reduction in the sales price, as well as the general atmosphere existing at that time caused him to withhold further order for the sale of the 1600 shares remaining.

Approximately one year later the principal parties to the litigation (which by that time had grown to some six (6) lawsuits) had determined to refer the matter to an arbitrator. This arbitration took place

during the period March 26, 1950, until about June 1, 1950. In this period a \$1,000.00 premium fell due on the indemnity bond posted as a result of Judge Sapiro's order. (Dfts. Ex. 7-B and 8-B.) In order to avoid the payment of this \$1,000.00 premium and due to the fact that nearly all of the 20,000 shares of stock had previously been sold in liquidation of the debt due to the Bay City Bank and Trust Company (which was admittedly a bona fide purchaser for value), it was determined by Blair Holdings Corporation that 2,000 shares of Blair stock could be held in lieu of the \$50,000 bond. Since Bay City Bank & Trust Company only had 1600 shares of stock remaining with Dean Witter & Co., and since that stock was earmarked for counsel fees and costs and since the Bank did not wish to become further involved, Mr. Virgil Dardi, the then president of Blair Holdings Corporation, loaned 400 shares of stock, and the same was escrowed pursuant to the letter of May 26, 1950, being Defendant's 1-B in evidence. (See Tr. of Record pp. 102-104.)

Upon the termination of the proceedings, the shares of stock thus escrowed were to be subject to either the order of the arbitrator, or the joint order of the parties. The said stock was to be substituted in lieu of the \$50,000 indemnity bond and would be turned over to Blair & Co. only if the arbitrator found that the Bay City Bank stock had *not been converted*, and only to the extent of any damages that Blair might have suffered by virtue of having been ordered to transfer the stock to Bay City Bank & Trust Company.

The arbitrator did not make any award concerning said stock, nor was any order or judgment of the Court made concerning same. (Dfts. Ex. 9-B, 10-B and 11-B.)

The arbitrator and the Court did find that the Bay City Bank & Trust Company stock had been converted by Blair Holdings Corporation, and such order and judgment of conversion obviously terminated the necessity of any further bond being posted. The finding of conversion of the Bay City Bank stock by Blair Holdings Corporation thus terminated any further requirement of the posting of undertaking of bond and the 400 shares of stock should have been returned to Virgil Dardi and the 1600 shares to the Bay City Bank. While Virgil Dardi requested that this be done (Tr. of Record p. 104), counsel for the corporation refused to do so.

At no time were the 1600 shares of stock (in the name of and held for the account of Bay City Bank & Trust Company) ever transferred by that Bank to Blair Holdings Corporation. At no time did any of the parties intend to effect a transfer of title to the 1600 shares of stock from Bay City Bank & Trust Company's account to any other person or company. The said 1600 shares of stock were allowed to remain in Dean Witter & Co., in the account of Bay City Bank & Trust Company, in lieu of a bond, in the spirit of assisting or attempting to effect a compromise and for the joint purpose of preventing an unnecessary expenditure of an additional \$1,000.00 premium on bond.

After March 11, 1949, when the 20,000 shares of stock standing in the name of Bay City Bank & Trust Company were deposited with Dean Witter for sale, the Wells Fargo Bank (who had stock powers and resolutions to endorse said certificates to the purchaser) caused the stock to be placed in "street name" to facilitate the sale and to expedite the transfers of said shares of stock by Dean Witter to the various purchasers. Defendant's Exhibit C, the Ledger Sheet for Bay City Bank & Trust Company, demonstrates that numerous sales were made and it was to facilitate and expedite transfers to these purchasers that Wells Fargo Bank caused the stock to be placed in "street name" and to be held in "street name" in the account of and for the account of Bay City Bank & Trust Company.

It is significant that at no time was the 1600 shares of stock ever taken out of the account of Bay City Bank or ever transferred by Bay City Bank to Blair Holdings Corporation, or any other person. (See Tr. of Record pp. 106-109.) It is submitted that the conclusive evidence established by Defendants' Exhibits 7-B and 8-B and Defendants' Exhibits A, F and G show that the lower Court's finding No. 8 and finding No. 10 are fully and completely supported by that evidence and that the title to said 20,000 shares of stock and the remaining 1600 shares of that block of stock at all times was and is the property of Bay City Bank & Trust Company.

ARGUMENT.

The sole issue raised in the brief of Appellants is that Bay City Bank & Trust Company never had title to the 1600 shares of stock on deposit with Dean Witter & Co. and, therefore, the finding of the Court to this effect is erroneous and, therefore, by virtue of Blair Holdings Corporation's writs of execution, they should be entitled to the stock.

Appellants contend that finding No. 8 is not supported by the evidence and assume something not in evidence in providing that Bay City Bank & Trust Company had title to the stock. (Appellants' Brief p. 22.) Defendants' Exhibits 7-B, 8-B, A, F and G all conclusively demonstrate that the title to the 20,000 shares of stock was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company on March 5, 1949. That the stock was then placed with Dean Witter & Co. for sale by the attorney of Bay City Bank & Trust Company, Phillip Barnett, and that ever since placing said stock with Dean Witter and to the present time, title to said stock remains vested in the Bay City Bank & Trust Company, subject to the order of Phillip Barnett. That the said 1600 shares of stock, remaining on deposit with Dean Witter, was a part and parcel of the 20,000 shares originally deposited there. Thus, Bay City Bank & Trust Company traced its title from March 5, 1949, down to the date of the trial, and the Court properly confirmed title of that stock in Bay City Bank & Trust Company, and awarded the said 1600 shares to Bay City Bank & Trust Company.

At page 20 of Appellants' Brief, it is stated that the levy of Blair has reached the interest of Crofoot (in said stock) which was never divested. Here again Appellants completely overlook the conclusive evidence that title of the 20,000 shares was divested from Crofoot and vested in Bay City Bank on March 5, 1949.

At pages 13-16 of the Appellants' Brief, a tenuous argument is made that while Bay City Bank might have been entitled to sell the stock and to pay off their loan and interest, together with attorney fees, the amount of the attorney fees represented by 1600 shares of stock is excessive and that, therefore, should not have been confirmed by the Court. It is argued that the fact that Blair blocked the transfer of stock, requiring Bay City to obtain counsel and to file suit to enforce the transfer, was no fault of Crofoot, therefore Crofoot should not be required to shoulder the burden of the Bank's attorney fees. However, earlier in their brief, they point out that Blair blocked the transfer of stock due to alleged fraud of Crofoot, forcing Bay City Bank to incur attorney fees and costs to effect the transfer of the stock.

In any event, the argument made involves simply a question of fact which was resolved in favor of Bay City Bank & Trust Company and against Blair Holdings Corporation by the lower Court, and is not an issue to be considered on appeal.

At pages 10, 11 and 15 of the Appellants' Brief, a theory is urged that Bay City Bank & Trust Company had simply a lien on the stock and that title

of the stock remained in Crofoot. This obviously disregards the order of Judge Sapiro under date of February 8, 1949, ordering that stock transferred to the Bay City Bank & Trust Company and completely disregards Defendants' Exhibits A, F and G, which conclusively demonstrates that the stock was transferred by Blair to Bay City Bank and that legal title to the stock thereafter remained in Bay City Bank in payment of the debt due plus attorney fees and costs incurred.

LEGAL AUTHORITIES CITED BY APPELLANTS.

The sum and substance of the legal authorities cited by Appellants is to the effect that a judgment creditor has a right to execute upon any equity that a pledgor might have in his pledged property, subject to the right of the pledgee to first satisfy his obligation out of said pledged property. With this proposition of law, the Appellee is in full agreement. However, it is fully inapplicable to the situation at bar for the simple reason that the pledgor-pledgee relationship between E. J. Crofoot and the Bay City Bank & Trust Company ceased to exist early in 1949, when E. J. Crofoot surrendered his stock in satisfaction of the obligations owing to the Bank, including the obligation for attorney fees and court costs incurred by the Bank in reducing the pledged stock to cash. Thus, there was no pledged relationship existing some five years later, in September, 1954, which was the time that Blair Holdings Corporation levied its execution as a judgment debtor. Therefore, of course, the

law cited by the Appellants is fully inapplicable in this case.

In summary, the Bay City Bank & Trust Company accepted from E. J. Crofoot the 20,000 shares of Blair stock in full payment and satisfaction of the debt owing by Crofoot to the Bank, including the costs and attorney fees incurred by the Bank in reducing the pledged property to cash. Thus, the Bank became the owner of said stock in a bona fide transfer for value five years and six months prior to the levy of the writ of execution by Blair as a judgment creditor.

The case of *San Angelo Hilton Hotel Company v. B. B. Hail Building Corporation*, 60 S.W. (2d) 1049, cited by appellant, simply holds that a landlord who is suing for rent due to him for the leasing of a hotel and to foreclose a chattel mortgage is entitled to request the appointment of a receiver for the corporate tenant of that hotel notwithstanding the fact that that landlord has assigned the rentals due from his lessee as a pledge to secure a mortgage debt. The Hail Building Corporation had built a hotel for the San Angelo Company and leased it to them for fifty years at a monthly rental of \$6,166.00 and took in pledge as security for the payment of the rent the hotel fixtures and furniture placed on the premises by the lessee. The lessee company became so greatly in debt and financially insolvent that the B. B. Hail Company sought the appointment of a receiver. In the meantime, however, the Hail Company had assigned the rents and revenues arising from this lease to third parties to

secure indebtedness which the B. B. Hail Company owed said third parties. The San Angelo Hotel Company, lessee, claimed that the Court should not have entertained the Hail Company's petition for receivership on the grounds that the Hail Company had assigned their interest in the rents and, therefore, was not a real party in interest. The Court held that they had not fully assigned their interest in the rents to third parties, but had merely given the third parties the right to collect the rents from the San Angelo Hotel Company in the event the B. B. Hail Company failed to pay its obligation to the third parties.

Obviously, this case is wholly not in point and has absolutely no substantive value as involves the issues in the case at bar.

The case of *Cross v. Eureka Lake Canal Company*, 73 C. 302, a case decided in 1887, is again not in point, the reason being that in the *Cross* case the suit was by the pledgor of certain stock against the pledgee, thus a suit involving the two parties to the pledge relationship. It did not involve an adverse claim by a creditor of the pledgor against the pledged property which was held by the pledgee. It is therefore not in point. In the *Cross* case, Mr. Zellerbach had borrowed \$50,000 from Mr. Sigourney and gave 1950 shares of stock into the hands of a Mr. Parrott to secure the indebtedness. Mr. Parrott was Mr. Sigourney's agent and turned the stock over to Mr. Sigourney. Thus, in effect, Zellerbach pledged 1950 shares of stock with Sigourney to secure a \$50,000 indebtedness. Upon Sigourney's death, his

administrator filed a suit upon the two notes, a judgment was entered and the Court ordered 1250 shares of the stock sold to satisfy the notes and all costs of action and expense of sale, thus leaving 750 shares of stock free and clear of any charge or encumbrance.

In the *Cross* case, Mr. Zellerbach prevailed, the Court ordering that he was entitled to the return of all dividends paid upon the stock during the period they were in pledge and that the person to whom Mr. Zellerbach had sold the 750 shares of stock had a right to claim it since the pledge had been discharged by the sale of the 1250 shares of stock and the payment of the obligation.

This case is not in point for two reasons. First, it is a suit by the pledgor against the pledgee to recover the income from the pledged property which was not required to liquidate the obligation owed; and, secondly, since the income received on the stock, together with the additional 750 shares of stock (not required in liquidation of the loan) was in excess of what was required, it should be returned to the pledgor upon payment of the obligation.

In the case at bar, however, the 20,000 shares of stock pledged by Crofoot were turned over to the Bay City Bank & Trust Company in full satisfaction of Crofoot's obligation to that Bank five years and six months prior to the levy of execution and all of said stock was required to liquidate the principal obligation, the interest thereon and attorney fees and court costs incurred in securing the transfer of the stock and applying the proceeds therefrom to the in-

debtedness. Thus, in the case at bar, the pledged property was just sufficient to meet these obligations and such was the finding of the Court in awarding the property to the Bay City Bank. In the *Cross* case the property recovered by the pledgor was over and above that required to liquidate the loan, pay attorney fees and court costs.

For the reasons above assigned, the Appellants have wholly failed to sustain their assertion that the findings and judgment of the Court below were erroneous and, in fact, it has been demonstrated herein that those findings and judgment are adequately supported by the evidence and the law.

Dated, San Francisco, California,
September 13, 1955.

BARNETT & ROBERTSON,
By RODNEY H. ROBERTSON,
Attorneys for Appellee.

No. 14,552

United States Court of Appeals
For the Ninth Circuit

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Appellants,

vs.

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a Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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United States Court of Appeals

For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation; BLAIR-ROLLINS & Co., INCORPORATED, a Corporation and BLAIR & Co., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY,
a Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William E. Orr and James Alger Fee, Circuit Judges, To the Honorable James F. Carter, District Judge assigned to the United States Court of Appeals:

Comes now your petitioner and petitions for a rehearing in the United States Court of Appeals, after decision by said Court reversing judgment of the United States District Court, and in this connection respectfully shows:

GROUND'S FOR REHEARING.

1. That the trial court found, based upon substantial evidence, that title to the 1,600 shares of stock in dispute was vested in Bay City Bank and Trust Company and the evidence before the court conclusively proved title in the Bay City Bank and Trust Company of said stock. The trial court found by its findings of fact that from March 5, 1949, when Bay City Bank acquired title to the 20,000 shares of stock, to the present time, title in the 1,600 shares of stock on deposit with Dean Witter & Co. remained in Bay City Bank or Phillip Barnett, and that it was not intended by the escrow to transfer title to said stock. The Honorable United States Court of Appeals found that Bay City's right was only a pledged right, dependent on possession and that the stipulation creating the escrow entitled Blair to an award of said stock. Such decision controverts the evidence of vested title in Bay City Bank.

2. The legal authorities cited at page 6 of the United States Court of Appeals Decision herein are not in point and are not authority justifying the reversal of the trial court's decision herein.

LEGAL ARGUMENT.

1. FINDING OF THE TRIAL COURT THAT BAY CITY BANK HAD TITLE TO THE STOCK IS SUPPORTED BY EVIDENCE.

In Paragraphs 5, 6, 8 and 10 of the trial court's findings (pages 36 to 38 Tr. of Record) the trial court

traced legal title of the stock in Bay City Bank. That evidence, which will be related hereafter, substantially confirms the finding of the court and runs contrary to the United States Court of Appeals decision that Bay City's right was only a pledged right, dependent on possession.

On September 16, 1948, the Bay City Bank loaned Crofoot and the Tuckerman Rice Milling Company \$35,000.00, evidenced by a promissory note, which was defendant's Exhibit E in evidence. This note was secured by a pledge of 20,000 shares of Blair Holdings Stock, which at the time was in the name of E. J. Crofoot. The note further provided for additional payment of 10% of the principal amount of the note for attorney fees, costs and other expenses which may be incurred in the event the bank was required to apply the stock to the settlement of the note. In the latter part of 1948, Crofoot and the Tuckerman Rice Milling Company were unable to pay the loan and Bay City Bank retained Phillip Barnett to secure the transfer of the pledged stock, cause same to be sold and to liquidate the loan, pursuant to the terms and conditions of the note and the retainer agreement between the bank and Phillip Barnett, 10% of said stock was to apply towards the cost of sale of said stock, attorneys fees incurred in causing same to be transferred, and other expenses. (See Trs. of Record, pp. 90-94.)

On March 5, 1949, Blair Holdings Corporation transferred the 20,000 shares of stock from the name

of E. J. Crofoot to the name of the Bay City Bank and Trust Company, after a court action was brought to procure said transfer, and this transfer of title in the stock is evidenced by Blair Holdings Co. invoices under date of March 5, 1949, and is supported by defendant's Exhibit A in evidence.

At the time the certificates of stock were pledged by Crofoot to the Bay City Bank, they bore Blair Holdings Corporation Certificate Nos. NHS-433, 434, 435 and 436, each certificate being in the amount of 5,000 shares, and standing in the name of E. J. Crofoot on the books of Blair Holdings Corporation. On March 5, 1949, after Blair transferred said stock to the Bay City Bank and Trust Company, pursuant to an order of the Superior Court of California, In and For the City and County of San Francisco, the stock certificates were in the amount of 5,000 shares each and bore Blair Holdings Corporation Certificate Nos. SHF 2805, 2806, 2807 and 2808 (Defts. Ex. A; Trs. of Record, pp. 51-53). Defendant's Exhibit G demonstrates that prior to March 11, 1949, Phillip Barnett had received the four certificates of 5,000 shares each, which had been transferred by Blair Holdings Corporation to Bay City Bank pursuant to court order, and that on March 11, 1949, Phillip Barnett transmitted said certificate numbers 2806, 2807 and 2808 to Dean Witter & Co. with instructions to sell same and deposit the proceeds in the Wells Fargo Bank to the credit of Bay City Bank & Trust Company. Said exhibits further demonstrated that Certificate No.

2805, in the amount of 5,000 shares, standing in the name of Bay City Bank & Trust Company had previously been transmitted to Dean Witter & Co. on March 9, 1949, by Phillip Barnett, and with the same instructions.

The evidence and documentary exhibits (Defendant's Ex. 7-B, 8-B, A, F and G) conclusively establish the fact that on March 5, 1949, 20,000 shares of stock which had previously stood in the name of E. J. Crofoot, was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company, and that title to said stock remained in the name of Bay City Bank & Trust Company, subject to the order of Phillip Barnett, with the proceeds of sale thereof to be deposited with the Wells Fargo Bank & Trust Company for the order of Bay City Bank & Trust Company.

Thus the evidence upon which the trial court based its findings of fact, above referred to, conclusively shows that the Bay City Bank and Trust Company had legal title to said stock and that it was subject to the instructions of their attorney, Phillip Barnett, and therefore the holding of the United States Court of Appeals that Bay City's right was only a pledged right, dependent on possession, is not supported by the evidence and is therefore erroneous.

The note executed by Crofoot and Tuckerman Rice Milling Company to the Bay City Bank on September 16, 1948 (Defts. Ex. E) was a contract requiring a payment not only of the principal sum of \$35,000.00,

but also interest, and also fees to the extent of 10% of the principal sum of the note, and costs incurred in forcing the sale of the stock to pay the note in the event Crofoot and Tuckerman Milling Company could not pay same.

The customer ledger sheet of Dean Witter & Co. demonstrated that on March 10, 1949 to March 16, 1949, all but 1,600 shares of Bay City Bank Stock held by Dean Witter & Co. had been sold by the order of Phillip Barnett and the proceeds sent to the Wells Fargo Bank and Trust Company for the account of Bay City Bank. \$35,239.96 was secured in this sale. The return of said sum covered only the principal obligation, but did not fully cover the interest nor the attorney fees and costs of suit incurred in causing the sale to be made.

The records disclose (Trs. of Record p. 99) that sale of the stock ceased on March 16, 1949, because of the fact that in selling the shares previously, the market and the stock had been depressed from a high of \$2.25 a share to a low of \$1.50 a share, and it was determined to withhold further sales of the stock for the time being. Further sale of the 1,600 shares of stock would be required to meet the attorney fees and costs of suit and interest payable, pursuant to the terms of the note. It is submitted that this evidence in the record adequately supports the finding of the trial court as to the title of the stock and completely negatives the holding of the Honorable Court that Bay City's right is only a pledged right.

The law relating to sufficiency of the evidence.

While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to a reviewing court, the reviewing court's duty ceases when it is determined that there is some substantial supporting evidence which supports the findings and decision of the lower court. See *Bristol Estate*, 23 C (2) 221; *Atkinson Estate*, 206 C 617; *Hicks v. Ocean Shore R., Inc.*, 18 C (2) 773.

The courts have assigned several expressions as to what it means by substantial evidence, such as, the decision will not be disturbed if supported by "some evidence" (*Barry v. Coughlin*, 90 C 220); or by "any evidence" (*Belasco v. Chick*, 84 CA (2) 802); or by "any reasonable amount of evidence" (*Wikman Estate*, 148 C 642). The basic and inherent rule has been stated that there is an inherent difference between a trial court and a reviewing court in that the trial court is primarily a trier of fact and the appellate court a reviewer of errors at law. See *Baird Estate*, 193 C 225.

This same rule of the state courts is applicable in the federal courts where it has been held that if the evidence reasonably supports the judgment or verdict, the judgment will not be reversed on appeal. See *Mutual Life Insurance Company of N. Y. v. Frey*, 71 Fed. (2) 259. Similarly, a finding of fact by the court sitting without a jury is equivalent to a verdict and hence will be disturbed by the reviewing court only when it clearly is erroneous or shows that the judge

was influenced by improper motives or misunderstood the evidence. See *Dower v. Richards*, 151 U.S. 658. A trial court's finding, which has been attacked by lack of evidentiary support must be upheld by the Appellate Court where evidence as to facts specified therein was conflicting. See *Wilson v. United States*, 100 Fed. (2) 552. Further cases supporting the proposition that the trial court's finding of fact based on conflicting evidence is conclusive on appeal are found in the following cases:

The Bergen, 64 Fed. (2) 877;

Clemens v. Coppin, 61 Fed. (2) 552;

Lippman v. Romich, 26 Fed. (2) 601.

It is submitted herein that the evidence was clear and certain as to the title of said shares of stock being in the Bay City Bank & Trust Company. The exhibits and documents in evidence have hereinabove been cited to support said title. At best, it could be argued that a conflict of evidence developed by virtue of the stipulation. However, bearing in mind the Rules on Appeal and Decisions cited immediately above, where there is a conflict of evidence, the findings of the trial court must prevail. The trial court found that title to the stock was in Bay City Bank & Trust Company, subject to the order of Phillip Barnett. The exhibits in evidence above cited, demonstrate that the Blair Holdings Corporation did transfer said stock to Bay City Bank & Trust Company and that it was never again transferred by that bank to any other person. The Honorable Court herein recited at page 6 of its

decision that Bay City's right was only a pledged right, dependent on possession and that Bay City executed the Stipulation whereby Crofoot placed the shares in escrow. In fact, the stipulation for escrow and escrow instructions demonstrate that the shares were already on deposit in Dean Witter & Co. and that they were allowed to remain there by the Bay City Bank.

At page 4 of the Court's opinion, it was stated that the effect of the previous state court's order requiring a \$50,000 bond was that Crofoot was indemnifying Blair for the transfer. In fact, the Bay City Bank & Trust Company was the concern which instituted action No. 383427 in the State Court in San Francisco, and procured the order of transferring the stock from Blair to the Bay City Bank, and it was Bay City Bank & Trust Company who was ordered by the State Court to post the \$50,000 bond on appeal. By the order of the State Court, it was Bay City Bank & Trust Company, and not E. J. Crofoot, who indemnified Blair for the transfer of the 20,000 shares of stock. See Defts. Ex. 7-B and 8-B.

While the stipulation describes the 2,000 shares of stock "being the said 2,000 shares of stock which Crofoot received from Bay City on sale of collateral to pay its loan to Crofoot", in fact the evidence conclusively demonstrated that Crofoot did not receive the 2,000 shares of stock, but that it remained held by Bay City Bank to satisfy attorney fees, costs, and any additional interest due, and it remained in Dean

Witter at all times. The evidence in the record further disclosed that because of the extreme complexity of the litigations between Bay City Bank, Blair, Crofoot, Rice, officials of the Bank of America, and other parties (involving some six actions), a simplification of names was effected.

The two disputing factions were designated for terms of simplicity "Crofoot Parties" and "Blair Parties". The Crofoot Parties involved Bay City Bank & Trust Company, E. J. Crofoot and Paul Rice, principally. The Blair Parties involved Blair Rollins of New York, Blair Holdings of California, Auto-Vend, Inc., Virgil Dardi, individual members of the Board of Directors of those corporations, and other individuals. Thus throughout these six preceedings which were arbitrated, everybody that was litigating against Blair were known as the Crofoot Parties, or Crofoot, and everyone litigating for Blair against the Bay City Bank, Crofoot and Rice were known as the Blair Parties, or Blair. The award of the arbitrator, the briefs presented to the arbitrator, proceedings before the arbitrator, and other documents involved in the litigation have all used the terms on numerous occasions when referring to the Blair Parties as Blair, or when referring to the Crowfoot Parties, as Crofoot. Therefore, the extreme emphasis placed by the Honorable Court on the statement in the escrow that Crofoot would escrow 2,000 shares of stock bears little weight, particularly when it is considered that these matters were before the trial court who heard the evidence and had all of the documents before it, and

based upon the testimony of witnesses and the documents before it, rendered a finding and decision that the stock was the property of the Bay City Bank & Trust Company.

At page 5 of this Court's decision reversing the lower court, it was stated:

“there was no *express* determination of the ownership of the 2,000 shares.”

The Court was referring to the decision of arbitration as affirmed by the District Court of Appeal of California. The Court has therefore established the fact that the issue of the 2,000 shares was not decided in the arbitration or in the District Court of Appeal, or otherwise, and the question of title to said stock therefore was properly before the trial court on the interpleader suit and the trial court did find title to be vested in the Bay City Bank in that decision and is supported by substantial facts which must be upheld on appeal.

2. THE LAW CITED IN THE OPINION REVERSING JUDGMENT IS NOT IN POINT AND IS NOT PERTINENT TO THE ISSUES.

The Court found at page 6 of its opinion that Bay City's right to the stock was only a pledged right, dependent upon possession, and by executing the stipulation they gave up possession and therefore their pledged right. In support of this position, the Court cited the cases appearing on page 6 of its opinion to the effect that Texas law is in accord with the general

law in California, that by contract of pledge the pledgor does not part with his general right of property in the collateral.

In the Findings of Fact of the lower court, following submission of evidence, traced title of the stock from E. J. Crofoot, as a pledgor, to the Bay City Bank & Trust Company, finding the transfer of the stock from Crofoot to the bank was made in order to secure the liquidation and payment of the note which Crofoot and Tuckerman Rice Milling Company had executed to the Bay City Bank. The Court found that the transfer of the stock had been effected on March 5, 1949, by order of the Superior Court and that the Bay City Bank commenced, through its agent Phillip Barnett, to liquidate the stock in satisfaction of the obligation owed by Crofoot and the Tuckerman Rice Milling Company. The substance of that evidence is obvious that the 20,000 shares of stock were transferred by Crofoot to the Bay City Bank & Trust Company in full satisfaction of the claims on the \$35,000 note and to secure the additional cost of interest, court costs and attorney fees in procuring the transfer of the stock. Crofoot having pledged the stock impliedly warranted that it could be transferred, and when the Blair Company posted a block on the transfer, the Bay City Bank & Trust Company was entitled to employ counsel to procure its transfer (being a bona fide purchaser) and is entitled to the cost of attorneys and Court in forcing the transfer of the stock to liquidate the obligation due to the bank. This evidence was all before the Court when it ren-

dered its finding that title to the 20,000 shares was vested in the Bay City Bank & Trust Co. Therefore, the Bay City Bank, after March 5th, no longer was a pledgor dependent upon possession, but owned the stock as payment for the obligation due to it.

It is therefore submitted that the rules of law pertaining to pledgor and pledgee are not applicable, since there was, in effect a sale and transfer of the stock in 1949 to the Bank by Crofoot to satisfy his debt, and it was not until five or six years later that Blair Holdings Corporation sought to execute upon the stock. The trial court found that the title had been transferred to the Bay City Bank some five to six years prior thereto and, therefore, they were the owners in fee of said stock, subject to the order of Phillip Barnett.

Further, the cases cited in the Court's opinion of *San Angelo Hilton Hotel v. B. B. Hail Building Corp.*, Tex. Civ. App., 60 S.W. (2) 1049, and *Cross v. Eureka Lake*, 73 C 302, are not in point. Those cases are discussed at pages 13 to 16 of the Appellee's Reply Brief on file herein. The *San Angelo Hilton Hotel Company* case is not even a pledge case. It involves assignment of rent and leases. The *Cross v. Eureka* case is not in point because that was a case by a pledgor against the pledgee to recover income from the pledged property which was not required to liquidate the obligation owed by the pledgor. In short, that case would only be in point in the event Crofoot was suing the Bay City Bank & Trust Company herein. However, a third party is seeking to sue the

pledgee to recover stock which the pledgee took in lieu of cash for a loan of money which the pledgee had made. Further, the *Cross* case is not in point, since in the *Cross* case the amount of income which had come in on the stock which had been pledged during the period the loan was outstanding far exceeded the amount of money required to liquidate the loan, and therefore, the pledgor was entitled to this overage of money. However, in the *Crofoot* case, the 20,000 shares of stock was barely sufficient to meet the principal obligation of \$35,000, together with the cost of suit and attorney fees that the bank was required to incur in order to procure the liquidation of the stock, in order to pay the loan. Further, the evidence conclusively demonstrated at page 99 of the transcript that when the Bay City Bank started to sell the stock, it was valued at \$2.25 a share, and in a matter of seven days, it had dropped to \$1.50 a share by virtue of the litigation pending in the sales of stock. For that reason, sales ceased on March 16th. This evidence is in the Dean Witter stock ledger sheet which was in evidence and was testified to by Mr. Barnett at page 99 of the transcript. At \$1.50 a share, 20,000 shares would not have even paid the principal obligation on the loan.

IN SUMMARY.

It is respectfully submitted that the findings of fact of the trial court were adequately and substantially supported by the evidence and the exhibits introduced at the time of the trial and which were before

the United States Court of Appeals. Further, said evidence conclusively demonstrated that title to the stock was in the Bay City Bank & Trust Company, having been transferred to that bank in March, 1949, some five or six years prior to the time the Blair Holdings Corporation sought to execute upon said stock. Further, this Court on review found that the State Court and the arbitrator did not expressly determine the title to said stock, and therefore, the determination of title in said stock by the lower Court herein (which determination is based on substantial evidence) adequately determined the issue. Further, the finding by the reviewing Court herein that Bay City Bank was merely a pledgee, when said pledge had been reduced to a transfer of the stock in March 1949 was wholly unsupported by the evidence and is an erroneous conclusion. Also, the cases cited by the reviewing court in support of that position, either do not relate to a pledgor-pledgee relationship as such, or are not in point factually.

It is respectfully submitted that a re-hearing herein should be granted by this Court to the appellee who prevailed in the lower Court, and that following said rehearing the decision of the lower Court should be affirmed.

Dated, San Francisco, California,
July 8, 1956.

BARNETT & ROBERTSON,
RODNEY H. ROBERTSON,
*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF MERIT

The undersigned, one of the attorneys of record for Appellees, does hereby certify that in his opinion this petition for rehearing is meritorious and that said petition is not interposed for purpose of delay.

Dated, San Francisco, California,
July 8, 1956.

RODNEY H. ROBERTSON.

No. 14,553

United States Court of Appeals

For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPO-
RATION, V. E. WILLEY, G. F. STURDE-
VANT, C. FITCH, L. A. PRISK, BILL
GREGORY, D. HULBERT and GEORGE N.
TAUSAN,

Appellants,

VS.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

OPENING BRIEF FOR APPELLANTS.

WILLIAM J. CROWELL,

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FILED

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PAUL P. O'BRIEN,
CLERK

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United States Court of Appeals For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPORATION, V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A. PRISK, BILL GREGORY, D. HULBERT and GEORGE N. TAUSAN,

Appellants,

VS.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

OPENING BRIEF FOR APPELLANTS.

STATEMENT OF PLEADINGS.

This suit was brought by plaintiff Harley W. Gustin (appellee) against defendants, Nevada-Pacific Development Corporation et al. (appellants) for the purpose of quieting title to a number of lode mining locations embraced in what is commonly known as the Kay Cooper group, allegedly located on unappropriated public domain and in full compliance with the laws of the United States and of the State of Nevada, by Carl Harry Cooper and R. C. Peterson between

September 16, 1949 and October 14, 1949 (plaintiff's complaint, Tr. 4-9). As originally constituted the Kay Cooper group comprised eleven claims, numbered consecutively from 1 to 11 inclusive, but as will later appear in the statement of the case, Kay Cooper locations Nos. 1, 2, 3, 4, 5, 7 and 11 are no longer in issue (Tr. 41).

Plaintiff also alleges that each of the Kay Cooper locations has been maintained in full compliance with the laws of the United States and of the State of Nevada as a valid and subsisting mining claim; that plaintiff acquired by conveyance all of said locators' right, title and interest therein and is now the owner and entitled to the sole and exclusive possession thereof, "in accordance with the laws of the United States and of the State of Nevada relating to the location and maintenance of mining claims" (Tr. 9-10); and that plaintiff has expended (on the entire group of eleven locations as originally constituted) more than \$10,000.00 in exploratory and development work (Tr. 9-10).

Plaintiff then alleges that on or about March 14, 1951 while he was in peaceable possession of the entire Kay Cooper group, defendants wrongfully and in trespass entered thereon and ousted plaintiff from possession, and that defendants have ever since wrongfully so continued in trespass upon and to withhold possession of the property, claiming and asserting some right, title or interest therein, which claims and assertions are wholly wrongful and without right or legal foundation (Tr. 10).

Answer and cross-complaint was filed by defendants Nevada-Pacific Development Corporation, Bill Gregory, L. A. Prisk and D. Hulbert (Tr. 15-24). Other nominal parties defendant named in the complaint failed to appear or answer and their default was entered by the Court below on pre-trial conference, at which defendant Bill Gregory was also eliminated (Tr. 30-34).

In substance, answering defendants deny all of the material allegations of the complaint as to the location, validity and maintenance as subsisting mining claims of most of the locations comprised in plaintiff's Kay Cooper group (Tr. 16).

By way of cross-complaint answering defendants allege the relocation on February 8, 1951 by L. A. Prisk and D. Hulbert, in full compliance with Federal and State laws of the several lode mining claims embraced in defendants' Ray Ricketts group, and that said claims were thereafter maintained in full compliance with said laws (Tr. 20-21); that on February 15, 1951 defendant Nevada-Pacific Development Corporation acquired peaceable possession of said Ray Ricketts group from defendants Prisk and Hulbert, and continuously thereafter have remained in actual possession and engaged in the mining and development thereof; and that the adverse claims of plaintiff are without right or legal foundation (Tr. 21-22).

Plaintiff's answer to defendants' cross-complaint alleges as a first defense, failure to state a claim upon which relief can be granted (Tr. 24), and as a second

defense denies all of the material allegations of said cross-complaint (Tr. 25-26).

Jurisdiction was conferred upon the District Court of the United States for the District of Nevada as set forth in the pleadings (Tr. 3-4; 15-16). The Court below having rendered final judgment herein, jurisdiction to review said judgment on appeal to this Court is conferred by Sec. 225 (a) (d) 28 U.S.C., Judicial Code, sec. 128 amended, and 30 *U.S.C.*, sec. 23 (R.S. 2320).

STATEMENT OF THE CASE.

In the prosecution of this appeal we are not concerned with those portions of the Record relating to:

(a) The original locations designated as Ray Ricketts Nos. 1 to 4 inclusive, made by defendants' predecessor Bill Gregory on July 1, 1947 (Tr. 49-50, par. 12). Those attempted locations were properly found to be void by the Court below, for failure to record Certificates of Location, as required by 1941 Stat. Nev., pp. 93-4; N.C.L. 1941 Supp., sec. 4122 (Tr. 39, 45);

(b) With the subsequent relocation of the Ray Ricketts No. 3 claim, attempted to be made in 1951 by defendants' grantors, L. A. Prisk and D. Hulbert (Tr. 51, par. 17). It was admitted by defendants, and the Court below so held, that there was no evidence of a discovery of mineral bearing vein or lode on the Ray Ricketts No. 3 (Tr. 44);

(c) With plaintiff's Kay Cooper Nos. 1, 2, 3, 4, and 5 attempted locations, which the Court below also held to be invalid for failure to record Certificates of Location as required by the Nevada statute, and from which determination plaintiff has taken no cross appeal (Tr. 41, 45); or

(d) With plaintiff's Kay Cooper Nos. 7 and 11 locations, as to which there is no conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 claims (Tr. 38).

The issues are confined to two fundamental questions:

(1) Whether plaintiff's mining locations known as Kay Cooper No. 6, Kay Cooper No. 8, Kay Cooper No. 9 and Kay Cooper No. 10 initiated by plaintiff's grantors, Carl Harry Cooper and R. C. Peterson between July 31, 1949 and September 30, 1949 had been completed in full compliance with legal requirements, Federal and State, particularly in relation to actual discovery of mineral-bearing rock in place on each of said locations so as to warrant their recognition as valid and subsisting mining locations, at the time defendants Hulbert and Prisk made their re-locations of Ray Ricketts No. 1, Ray Ricketts No. 2 and Ray Ricketts No. 4 on February 8, 1951.

(2) Whether a discovery of mineral-bearing rock in place was made upon the lands embraced in defendants' 1951 relocation of the Ray Ricketts No. 2 claim in the manner and within the time prescribed by law.

The chronological history of the mining lands embraced in the conflicting locations of plaintiff and defendants, as disclosed by the record, shows that the mining lands as covered by the 1951 relocations of Ray Ricketts Nos. 1, 2 and 4 of Nevada-Pacific Development Corporation's grantors were originally located by the predecessors in interest of said grantors some twenty years prior to plaintiff's entry on the ground (Tr. 276-280).

It also appears from the record that the original 1947 attempted locations of the Ray Ricketts group by defendant Gregory preceded plaintiff's purported locations of Kay Cooper Nos. 6, 8, 9 and 10 in 1949 (Plaintiff's Ex. 2, Tr. 72), but were properly held invalid by the Court below for failure to file Certificates of Location within the 90-day period prescribed by Nevada law (Tr. 39), that those void locations were followed by the 1951 relocations of Ray Ricketts Nos. 1, 2 and 4 lode mining claims made by Hulbert and Prisk on February 8th of that year (Defendants' Ex. G, Tr. 273-4, 216, 316-21), and that Certificates of Location therefor were duly recorded within said 90-day period (Defendants' Ex. G, Tr. 270-4).

The Certificates of Location for plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 (Plaintiff's Ex. No. 1, Tr. 70-1) recite that Location Notices were posted on the ground on July 31, 1949 and September 30, 1949. All of those Certificates were recorded within the 90-day period prescribed by Nevada law, and those formal acts of location ante-dated the relocations on Febru-

ary 8, 1951 of defendants' Ray Ricketts Nos. 1, 2 and 4 claims.

These factual conditions have resulted in conflict areas as between

(a) Plaintiff's Kay Cooper No. 6 location, which is overlapped by defendants' Ray Ricketts No. 4 claim;

(b) Plaintiff's Kay Cooper No. 8 location, which is overlapped by defendants' Ray Ricketts Nos. 1 and 2 claims;

(c) Plaintiff's Kay Cooper No. 9 location, which is overlapped by defendants' Ray Ricketts Nos. 1, 2 and 4 claims; and

(d) Plaintiff's Kay Cooper No. 10 location, which is overlapped by defendants' Ray Ricketts No. 2 claim (Plaintiff's Ex. 11, Tr. 75; Plaintiff's Ex. 17, Tr. 177; Defendants' Ex. A & B, Tr. 75-6).

Defendants contend that excepting only for the self serving declarations of discovery recited in plaintiff's Certificates of Location, plaintiff has presented no satisfactory evidence of the actual discovery of a vein or lode of mineral-bearing rock in place on any of the purported Kay Cooper locations Nos. 6, 8, 9 and 10 anterior to the relocation of defendants' Ray Ricketts Nos. 1, 2 and 4 claims on February 8, 1951; that lacking such precedent discovery the attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 were and are invalid, and that the lands purportedly embraced therein

were then open to relocation by defendant Nevada-Pacific Development Corporation's grantors.

SPECIFICATION OF ERRORS.

1—The Findings, Conclusions and Decision of the Court below, in the particulars hereinafter mentioned, are not supported by the evidence, are contrary to the evidence, and are against law.

2—The Court below erred in finding and deciding that the Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims were located prior to October 15, 1949 in full compliance with the laws of the United States and of the State of Nevada (Finding No. 5, Tr. 47).

There is no factual evidence in the record that a vein or lode of mineral-bearing rock in place was discovered upon each of said mining locations prior to the location of defendants' Ray Ricketts Nos. 1, 2 and 4 on February 8, 1951, as required by R.S. 2320 (30 USCA, sec. 23), and sec. 4121 Nevada Compiled Laws 1929.

3—The Court below erred in finding and deciding that said Kay Cooper Nos. 6, 8, 9 and 10 have each been maintained in full compliance with the laws of the United States and of the State of Nevada, and at all times since their location have been and are valid and subsisting mining claims (Finding No. 8, Tr. 49).

Valid discovery, as mentioned in par. 2 supra, is an essential prerequisite to the maintenance of a valid and subsisting lode mining claim.

4—The Court below erred in finding and deciding that plaintiff is the owner of, and entitled to the sole and exclusive possession of the Kay Cooper Nos. 6, 8, 9 and 10 claims in accordance with the laws of the United States and of the State of Nevada relating to the location and maintenance of lode mining claims (Finding No. 9, Tr. 48-9).

In the absence of discovery, an inchoate or attempted location confers no exclusive right of possession on the purported locator as against a subsequent locator who makes peaceable entry on the ground and effectuates a valid location by prior discovery.

5—The Court below erred in finding and deciding that at all times mentioned in the Complaint plaintiff was in the quiet and peaceful possession, and entitled thereto, of Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims and that while plaintiff was in such lawful possession, defendants attempted to locate Ray Ricketts Nos. 1, 2 and 4 lode mining claims covering and embracing portions of said Kay Cooper Nos. 6, 8, 9 and 10 claims (Finding No. 10, Tr. 49).

As mentioned in par. 4 supra, in the absence of a discovery on each potential claim plaintiff was not entitled to such sole and exclusive possession as would bar a subsequent locator from peaceable entry thereon for the purpose of making a location validated by actual discovery.

6—The Court below erred in finding and deciding that defendants' claims of title to the premises covered by Kay Cooper Nos. 6, 8, 9 and 10, or portions thereof embraced in the Ray Ricketts Nos. 1, 2 and 4 locations, are wrongful and without right (Finding No. 11, Tr. 49).

For the reasons stated in pars. 2 and 4 *supra*, defendants' peaceable entry on February 8, 1951 for the purpose of locating and validating by actual discovery the Ray Ricketts Nos. 1, 2 and 4 mining claims was rightful and legally permissible.

7—The Court below erred in finding and deciding that no mineral-bearing vein or ledge (lode) of rock in place was discovered on the 1951 location of defendants' Ray Ricketts No. 2 lode mining claim, except upon that portion of said claim "which conflicts with, overlaps and embraces ground within the confines of the valid and prior existing lode location, Kay Cooper lode mining claim No. 8." (Finding No. 16, Tr. 51).

For the reasons stated *supra* in pars. 2, 3, 4 and 6, the lands embraced in the 1951 location of defendants' Ray Ricketts No. 2 lode mining claim, allegedly conflicting with and overlapping plaintiff's Kay Cooper No. 8 location, were at the time of the location of said Ray Ricketts No. 2 claim on February 8, 1951, part of the open and unappropriated public domain, because of the failure of either plaintiff or his grantors to make a valid discovery on the lands sought to be embraced in said Kay Cooper No. 8 location prior to the validation of said Ray Ricketts No. 2 claim by

actual discovery thereon of a vein or lode of mineral-bearing rock in place in the manner and within the time prescribed by law.

8—The Court below erred in finding and deciding that plaintiff has valid title to those portions of the ground embraced in defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims which conflict with or embrace any of the ground covered by plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims (Finding No. 19, Tr. 52).

This finding is inconsistent with Finding No. 15 (Tr. 50) in which the Court below holds that Ray Ricketts Nos. 1 and 4 were located by defendants Prisk and Hulbert on February 8, 1951 "in full compliance with the laws of the United States and of the State of Nevada."

Time of location is not the sole controlling factor in determining the question of seniority as between conflicting mining claimants. The more important factor to be considered is priority of discovery, as mentioned supra in pars. 2, 3, 4, 6 and 7.

9—The Court below erred in finding and deciding that defendants' claims to Ray Ricketts Nos. 1 and 4 are limited to those portions not in conflict with or embracing any of the land included in Kay Cooper Nos. 6, 8, 9 and 10 (Finding No. 20, Tr. 52).

This Finding is also inconsistent with Finding No. 15, for the reasons mentioned supra in par. 8.

10—The Court below erred in failing to find, as a Conclusion of Law, that defendants' 1951 location of

the Ray Ricketts No. 2 lode mining claim was made upon the open and unappropriated public domain; that prior discovery of a mineral-bearing vein or lode was made thereon by defendants in the manner and within the time prescribed by law; and in failing and refusing to render judgment quieting title thereto in defendants (Tr. 53-4).

11—The Court below erred in failing to find, as a Conclusion of Law, that plaintiff's attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 purported lode mining claims were and are invalid for failure on the part of either plaintiff or his grantors to make discovery thereon of a vein or lode of mineral-bearing rock in place as required by law; in failing to find that defendants made prior discovery on the Ray Ricketts Nos. 1, 2 and 4 lode mining claims, and upon each of said claims in the manner and within the time prescribed by law; and in failing and refusing to render judgment quieting title in defendants to all those parts and portions of the lands sought to be embraced in plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 attempted locations which overlap and are in conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims (Tr. 52-3).

SUMMARY OF ARGUMENT.

As indicated in the preceding Statement and Specification, it is defendants' purpose to establish, by a narrative analysis of all of the material evidence, that

the attempted locations of plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 are invalid for failure to make mineral discovery on each of those claims as required by both Federal and State law.

Plaintiff presented no such evidence of discovery as is required by the mandatory provisions of the Federal statute and of the equally controlling Nevada statute (R.S. 2320, 30 U.S.C., sec. 23 and sec. 4121, Nevada Compiled Laws 1929).

The burden of proving prior discovery for the validation of those attempted locations is upon plaintiff, and has not been met. Nor did the Court below make any specific findings on the all important question of discovery, but limited its findings in that regard to a generalized statement to the effect that plaintiff's locations were made and maintained in full compliance with the laws of the United States and of the State of Nevada (Findings Nos. 5 and 8, Tr. 47-8).

In the absence of substantial evidence of prior discovery, as the essential element material to the issue of plaintiff's allegedly superior title to possessory mineral lands located on the public domain, the findings of the Court below are so clearly erroneous as to warrant reversal (FRCP 52a).

As opposed to the lack of positive evidence of discovery on plaintiff's Kay Cooper Nos. 6, 8, 9 and 10, defendants presented undisputed evidence that valid discovery of a vein or lode of mineral-bearing rock in place was made upon each of defendants' Ray Ricketts Nos. 1, 2 and 4 claims.

The Court below predicated its adverse findings as to certain portions of defendants' Ray Ricketts Nos. 1 and 4 claims solely upon priority of posting Location Notices and filing Certificates of Location for plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 prescribed by Sec. 4121 N.C.L. 1929 and Sec. 4122 N.C.L. 1941 Supp., without reference to the fundamental need for actual discovery required by Federal and State laws. In finding defendants' Ray Ricketts No. 2 claim absolutely void the Court below held that the only discovery made on that claim is within the conflict area overlapping plaintiff's Kay Cooper No. 8 lode mining claim (Finding No. 16, Tr. 50-1; and Tr. 43-46).

ARGUMENT.

1. THERE WAS NO VALID DISCOVERY ON PLAINTIFF'S KAY COOPER NOS. 6, 8, 9 AND 10 ATTEMPTED LODE MINING LOCATIONS.

Throughout the mining history of the West actual discovery of a mineralized vein or lode of rock in place has been a mandatory requirement, recognized by miners' rules and regulations and later by Courts of last resort, as the genesis and fundamental essential to validation of a lode mining claim on the public domain.

A review of the evidence adduced by plaintiff in support of alleged discoveries on any of his conflicting Kay Cooper locations Nos. 6, 8, 9 and 10 conclusively demonstrates the absence of such a discovery as is required by mining law, Federal and State.

The Federal statute (R.S. 2320) prescribes:

“Length of claims on veins or lodes. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other.”

(30 U.S.C., sec. 23, p. 47.)

Nevada law on the requirements for discovery is explicit:

“Location work.—Boundaries, how and when defined. Sec. 2. The locator of the lode mining claim must sink a discovery shaft upon the claim located four feet by six feet to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such work a lode deposit of mineral in place; a cut or crosseut or tunnel which cuts

a lode at a depth of ten feet or an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft.”

(Nevada Compiled Laws 1929, sec. 4121)

Similar state statutes supplementing Federal law on the location of mining claims have been upheld as exercising a lawful delegation of Congressional legislative power (*Butte City Water Co. v. Baker*, 196 U.S. 119; 49 L.Ed. 409).

Plaintiff opened his case with documentary offers, which include Certificates of Location for Kay Coopers 6, 8, 9 and 10, and descriptions of the discovery work allegedly performed by the locators in compliance with Nevada law (Sec. 4121, *supra*).

Kay Cooper No. 6 was located on July 31, 1949 by Carl Harry Cooper and R. C. Peterson. The Certificate of Location describes the discovery work as:

“The discovery work consists of an open cut located about 50 feet in a Southerly direction from the location monument, and its dimensions are 6 feet wide, 8 feet long and 5 feet deep, exposing ledge, lode or vein.”

and as having been completed since July 31, 1949. The Certificate was recorded on September 12, 1949 (Plaintiff's Ex. 2, Tr. 72).

Kay Cooper No. 8 was located on August 1, 1949 by the same locators according to the Notice of Location (Plaintiff's Ex. 1, Tr. 71-2), but on September 15, 1949, as shown in the Certificate of Location

(Plaintiff's Ex. 2, Tr. 72). The Certificate of Location describes the discovery work as:

“The discovery work consists of an Open Cut located about 25 feet in a westerly direction from the location monument, and its dimensions are 6 feet wide, 13 feet long and 3 feet 6 inches deep, exposing ledge, lode or vein in place”

and as having been completed since September 15, 1949. The Certificate was recorded on September 16, 1949.

Kay Cooper No. 9 was located on September 30, 1949 by the same locators. The Certificate of Location describes the discovery work as:

“The discovery work consists of a pit situated about 25 feet in a Westerly direction from the location monument, and its dimensions are 6 feet wide, 14 feet long, 3.5 deep, feet wide, feet long and feet deep, exposing a ledge, lode or vein in place.”

and as having been completed between September 30, 1949 and October 7, 1949. The Certificate was recorded on October 14, 1949.

Kay Cooper No. 10 was located on September 30, 1949 by the same locators, according to the Certificate of Location (Plaintiff's Ex. 2, Tr. 72), there being no specific testimony on that point. The Certificate of Location describes the discovery work as:

“The discovery work consists of a pit situated about 20 feet in a westerly direction from the location monument, and its dimensions are 5.5

feet wide, 14 feet long and 3.25 feet deep, exposes a ledge, lode or vein in place.”

and as having been completed between the 30th day of September, 1949 and the 7th day of October, 1949. The Certificate was recorded on October 14, 1949.

It will be noted that discovery work on Kay Coopers Nos. 6 and 8 is described as consisting of an Open Cut, and on the Kay Coopers Nos. 9 and 10 as consisting of a pit. The characteristics and dimensions of these workings were mentioned in the testimony of the two locators, and will be discussed later.

The Certificates of Location were all duly recorded as required by sec. 4122 N.C.L. 1941 Supp., and plaintiff then proceeded to supplement the documentary record with oral testimony on the several acts of location. We shall confine our attention to the lack of discovery on Kay Cooper Nos. 6, 8, 9 and 10.

Reviewing plaintiff's supporting evidence on discovery in the order in which it appears in the record:

Joe Federhoff testified that as an employee of J. L. Dougan, and acting under the instructions of Lee Dougan, he diamond drilled “the property” to the extent of approximately 700 or 800 feet, from about the middle of February, 1950 until the latter part of March, 1950 but did not designate the locus of his drilling by claim name (Tr. 77-8). The witness also testified that he took out cores, marked and preserved them, and described the machinery used by him in the process of drilling (Tr. 77-8).

The witness was not asked, and did not testify on what particular claim or claims comprised in the Kay Cooper group his drilling was performed, nor did he furnish any information as to the character of the rock penetrated by the drill, or as to the mineral content, if any, shown in the cores. Beyond question, if one seeks to establish a mineral discovery by core drilling, sound mining practice requires production of the cores and assays as evidence of what was found in the drill hole at depth in order to indicate the existence of a vein or lode. That is the initial step toward establishing a valid discovery.

For all practical purposes, and in the absence of drill cores with certified assays of their mineral content, the testimony of this witness is wholly ineffectual.

In any event, it is open to question whether drilling performed between the middle of February and the end of March, 1950 may be considered as supplementing and correcting defects in discovery work which should have been performed within 90-days following location, unless evidenced by filing of the Amended Certificates of Location prescribed by Sec. 4125, N.C.L., 1929.

Plaintiff's witness J. L. Dougan, optionee of the Kay Cooper locators, R. C. Peterson and Carl Cooper, under their Agreement of September 8, 1949 (Plaintiff's Ex. 3, Tr. 73), testified that he first visited the Kay Cooper group one week after the Agreement was executed (Tr. 82), accompanied by Victor E. Peter-

son and his brother Lee Dougan; that he saw the monuments and workings on each of the Kay Cooper claims about September 11, 1949 (Tr. 84); that he saw Mr. Peterson and Mr. Cooper "working out there" (Tr. 85); that he was on the property again the latter part of October, 1949, and about the 1st of December, 1949, and they were working on the Kay Cooper No. 8 and on the Kay Cooper No. 2 "making additional cuts" (Tr. 85-6); that he next visited the property in April, 1950 and that between September 8, 1949 and April 1, 1950 he spent between \$19,000.00 and \$20,000.00 on the property, of which \$10,000.00 was option money paid to Cooper and Peterson and to Boyle Brothers for drilling costs (Tr. 87-8).

Testimony elicited from this witness on direct examination did not identify discovery on any of the Kay Cooper claims, and designated only one of the claims in controversy, Kay Cooper No. 8, as a place where work was being performed when he visited the property in October and December, 1949. It is also significant that the option granted to this witness on September 8, 1949 and thereafter extended on October 8, 1949 and again on December 14, 1949 was relinquished by the witness on June 30, 1950 after expending upwards of \$20,000.00 (Tr. 73).

In the absence of any explanation of record regarding this relinquishment, it may be reasonably assumed that in the opinion of the witness the lands embraced in the optioned properties did not warrant the expenditure of further time and money.

On cross examination this witness testified that monuments of the Kay Cooper claims were pointed out to him but he paid no attention (Tr. 89); that he had no knowledge as to who did the work on the Kay Cooper locations before his first visit to the property in September, 1949 (Tr. 90); that at the time of his first visit, Kay Cooper No. 8 had already been located and Kay Coopers Nos. 9 and 10 were in process of location (Tr. 91); that on his first trip to the grounds he saw an old building and small workings on the southwest portion of the claim, and again observed that same camp site on his subsequent visit (Tr. 92-3).

Carl Harry Cooper, one of the locators of Kay Cooper Nos. 6, 8, 9 and 10, testified on direct examination that he has been prospecting for mining claims for 25 years (Tr. 119); but when asked to state exactly what he did in locating one of the Kay Cooper group answered: "I can't tell you exactly what happened. I can state that we went out lamping the ground there, prospecting around for tungsten." (Tr. 120-1). In connection with monumenting the witness stated that side-line posts are not compulsory. (Tr. 122).

Testifying generally in relation to discovery work performed on other claims in the Kay Cooper group the witness stated: "When we found our tungsten, we dug a trench consisting of in excess of 240 feet or more, an open cut" and "that he found tungsten in that cut." (Tr. 123); that they started locating in June 1949, sometime between the 9th and 12th, and finished in 1950 (Tr. 127).

The testimony of this witness is so generalized that the limited evidence he furnished on the question of discovery on Kay Cooper Nos. 6, 8, 9 and 10 cannot be brought into proper focus as to those claims without referring to other claims in the Kay Cooper group which are not now in dispute. The witness testified that he did the location work on Kay Cooper Nos. 6 to 11 "the same as the past, open cut, 240 cubic feet or more each and every one of them." When asked if that was the condition "on each of those claims, from 6 to 11," the witness answered: "That's right." (Tr. 129); and that they found ore, tungsten, scheelite, in the location cuts (Tr. 129).

The witness gave further generalized testimony that he worked for Mr. Dougan while he had his option on the property; that he helped to do work on the Kay Cooper No. 8 and the Kay Cooper No. 2, that he worked there for four or five days during the first part of October, 1949 (Tr. 139-140), and that Peterson, Daly and Seri worked there at the same time (Tr. 140).

The witness Cooper testified that discovery work shown in the Certificates of Location for Kay Coopers Nos. 6, 8, 9 and 10 was taken from measurements made by him and that Peterson and Brown did the discovery work (Tr. 165-166).

L. B. Spencer, testified on direct examination that he is a civil and mining engineer and made a survey of the Kay Cooper group in March, 1951 returned there for further work in April, 1951 and prepared the map (Plaintiff's Ex. 11, Tr. 176); that he was em-

ployed by plaintiff, Harley Gustin, "to make a survey locating the corners of the claims as they occurred on the ground, the location of the discovery monuments and such work as was designated as discovery work on those claims." (Tr. 176).

The witness then testified that after the first survey was made, in March and April, 1951, he surveyed "the workings and drill holes which were pointed out to me by Mr. Albert Brown as the work which had been done on the property;" that he plotted them on the map and listed the descriptions (Plaintiff's Ex. 11, Tr. 176-7); that he also prepared the maps (Plaintiff's Ex. 17, Tr. 177) showing the workings as added from his later survey, the location of the drill holes and listing the different workings by number and position as located by his survey on the ground (Tr. 177).

On cross examination the witness testified that Plaintiff's Ex. 17 is an exact duplicate of Plaintiff's Ex. 11, "with the exception of the added data concerning work and improvements" which he found to be on the claims represented, on the basis of the later survey which was made on April 8th or 10th, 1951 (Tr. 178-9).

The witness admitted that he had no personal individual knowledge as to how or by whom any of the developments indicated in his legend were placed on the ground—they were pointed out to him by Albert Brown and then surveyed where they found them (Tr. 179); and that the circles shown on Plaintiff's Ex. 17 indicate the discovery monuments on each claim (Tr. 180).

Another witness called by plaintiff in his efforts to establish discovery was R. C. Peterson, one of the co-locators of the Kay Cooper group (Tr. 181). On direct examination this witness also testified in general terms and described the discovery work performed by himself and Mr. Brown on Kay Cooper No. 1 as "a hole in the ground," which measured "over 240 cubic feet of ground removed" (Tr. 182), and found mineral in all of them (Tr. 184-5). The witness then described the discovery work on Kay Cooper Nos. 6, 8, 9 and 10 as "open cuts and such as that" (Tr. 185).

On cross examination the witness could not state whether there was mineralized rock in place in each of the discovery holes, and all he could say was that "there was mineral present in each hole" (Tr. 190). When asked whether he found mineral in rock in place, in a vein, in each discovery hole, he answered: "That I couldn't say for sure" (Tr. 190-191).

The witness did not recall doing any work on Kay Cooper No. 8—"That work was started after I left there" (Tr. 188).

On redirect examination the witness further testified that the scheelite found on the Kay Cooper claims was in a decomposed granite (Tr. 194).

Victor E. Peterson, a witness called by plaintiff, testified on direct examination that he is a civil engineer (not a mining engineer) and geologist employed by Equity Oil Company, of which Mr. J. L. Dougan is president (Tr. 195-196).

He first visited the Kay Cooper claims in May, 1949, at the request of the locators, Peterson, Cooper and Brown, spent one day and part of one night on the Kay Cooper No. 2 and next visited the property over the weekends of July 4th and July 24th, 1949 as a consultant, for the purpose of helping the locators to appraise and sell the property (Tr. 197). On those three visits he centered his efforts on sampling and lamping on Kay Cooper No. 2, and upon his return to Salt Lake City "expressed his enthusiasm" to his employer's president, Mr. J. L. Dougan (Tr. 198-201).

The witness returned to the property about September 14, 1949 and he and Lee Dougan prepared a topographic map (Plaintiff's Ex. 18 Iden.) from a survey they made during the period September 11th to 18th, 1949 and November 30th to December 11th, 1949, covering only Kay Cooper No. 8 and Kay Cooper No. 2 claims (Tr. 202-3).

The witness was then shown Plaintiff's Ex. 17 (Spencer map with added workings) and when asked whether two trenches shown on Ex. 18 (Iden.) correspond with the red and black markings on that exhibit answered: "To be absolutely sure, I would have to see them on the map, but I think without question they are." (Tr. 204); that he knew who was doing the work on the trenches—did not watch the work, but saw it from time to time, and saw R. C. Peterson, Daley, Lee Dougan and another miner with Mr. Dougan, and that he helped Mr. Dougan outline the locations for the excavations that were made (Tr. 204-205).

The witness testified that Plaintiff's Ex. 19 (Iden.) is a tracing of the Kay Cooper portion of the colored map (Plaintiff's Ex. 18), on which he has outlined the Kay Cooper claims in green and the Ray Ricketts claims in red (Tr. 209).

When asked if he found mineral in place on these claims, the witness first answered "I did," and when asked on "What claims?" answered: "On all claims," but then stated:

"Now if I may, in order to clarify my position on that, I would like to make a definition of what I saw." (Tr. 211).

The witness then proceeded to clarify, and also to materially qualify his precedent affirmance that he found "mineral in place on these claims." Summarizing what he found, the witness did not designate by name any of the claims in dispute other than Kay Cooper No. 6 and Kay Cooper No. 8. After describing the mineralization as occurring in granitic rock and deposits of unconsolidated material, the witness adverted to the question of ore in place and stated:

"Now from a geologist's standpoint, without going into considerable work, I can not say whether or not that unconsolidated material, which a layman might refer to as gravel, is the result of residual weathering or transported there. For that reason I can not say, in some instances, whether or not the ore is in place. Now that is true in the case of the ore in the vicinity of the Kay Cooper No. 8, where I can not say definitely whether it is transported material or is the result of residual weathering, whereby it is

possible to develop material of granular nature strictly through weathering, through no transportation, so as to say whether or not we found ore in place in some instances, I do not know for sure without further investigation. However, there was scheelite, tungsten, at the site, at these sites. In the discovery cuts we found tungsten in place in that respect.”

Interrupting the Court’s unfinished question: “That would apply to all of the—” the witness answered:

“That would not apply to all of them. Of course, in the case of No. 8, there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the south, in what might be called reconsolidated matter, that is open to question.”

(Tr. 211-213).

Plaintiff’s closing evidence in chief was in the form of a deposition of Albert Brown.

This witness testified that he has been engaged in the business of prospecting and mining for about 45 years and assisted in locating the Kay Cooper group commencing on June 12, 1949 (Tr. 219).

The witness then gave more generalized testimony regarding Kay Cooper locations no longer in dispute; that they had lamped the ground and discovered ore in place on Kay Cooper Nos. 1 and 2 (Tr. 220-226); used the same process for Kay Cooper No. 3 and No. 4

(Tr. 231-237) ; and could not recall whether he assisted in locating the Kay Cooper No. 5 (Tr. 237).

On cross examination the witness further testified only in regard to the Kay Cooper Nos. 1 to 5 ; stated that there was a discovery of mineral-bearing rock in place on each of those claims, but neither on direct examination or cross examination gave any testimony whatever regarding Kay Coopers Nos. 6, 8, 9 and 10.

The testimony of plaintiff's witnesses descriptive of the discovery work performed on Kay Cooper Nos. 6, 8, 9 and 10 lode locations does not support the descriptions of such work in the Certificates of Location filed by the locators, either as to the discovery of a vein or lode required by Federal law, or as to the exposure of a lode deposit of mineral in place prescribed by Nevada law. The meagre evidence presented is inadequate to meet the requirements of either the Federal or State statute.

The nearest approach to any positive evidence of discovery was made by the witness Victor E. Peterson, civil engineer and oil geologist, in his qualifying statement on the question of mineralized ore in place, but neither in his explanatory dissertation or elsewhere in his testimony did this witness once mention the presence of a "vein or lode," as required under Federal law, or of "a lode deposit of mineral in place," as required by Nevada law.

Standing alone and unchallenged this type of evidence on what constitutes discovery does not suffice to meet those requirements.

Had there been no traverse of plaintiff's evidence, the fact remains that plaintiff failed to produce sufficient proof of prior discovery to make a *prima facie* showing on his case in chief and thereafter made no substantial effort to rectify that defective showing in rebuttal.

Such generalities as are connoted by references to a surface mineral showing in the wide area embraced in a contiguous group of locations, but not identified with any specified location or sufficiently described to show a vein or lode of mineralized rock in place, do not meet the Federal and State requirements for an actual discovery within the area embraced by each asserted mineral location.

We now propose to show that such evidence as is presented by plaintiff in relation to discovery is countered by a succession of defendants' witnesses who gave positive testimony on the absence of a vein or lode of mineralized rock in place on any of plaintiff's disputed locations, as of February 8, 1951.

Harold Morris Weaver, called out of order as defendants' first witness, testified that he is a graduate mining engineer and geologist, was employed by defendant Nevada-Pacific Development Corporation to examine the Kay Cooper and Ray Ricketts groups of mining locations in August, 1953 (Tr. 99-100); that he prepared certain contour and profile maps (Defendants' Ex. B, and D) and a profile model (Defendants' Ex. C, Tr. 102-104); that he had no personal knowledge of who performed the work or erected

corner posts indicated on the profile map by colored pins (Tr. 105); that he used the Spencer map (Plaintiff's Ex. 11) as a source of information for plaintiff's discovery monuments of the Kay Cooper claims on the contour map; used the Malone Engineers' map (Defendants' Ex. A) for identifying the Ray Ricketts' location or discovery monuments on the profile map (Tr. 107-8); and that the composite map showing the Ray Ricketts locations superimposed on the Kay Cooper locations (Defendants' Ex. B) was used by him in preparing the profile model (Tr. 108).

On cross examination the witness described in detail how he prepared the profile map and relief model (Defendants' Ex. C, Tr. 108-117); that the relief model shows "general terrain, the location of the claims upon the terrain and the location of the excavations of that terrain" (Tr. 116).

In admitting the relief model in evidence (Defendants' Ex. C), and referring to the descriptive testimony, the Court said:

"What he said is it is a very accurate representation of the topography, that it shows the places where the excavations were made, it shows those that were designated to him as having been made by his client, it shows those which were not so designated, which perhaps assumed that they were made by other people. I think that is all. Is that right?"

to which the witness replied affirmatively (Tr. 117).

Charles W. Hulbert, (known also as "D" Hulbert and "Drummond" Hulbert), one of the defendants and a co-locator of Ray Ricketts Nos. 1, 2 and 4 lode

claims, testified that he is in the cattle and mining business, first visited the area of the ground now in dispute about 1933 with his father-in-law, Ray Ricketts, who was mining in the immediate area now occupied by the Ray Ricketts claims, which were then known as the "Granites" (Tr. 276-9).

After narrating further historical data affecting the disputed area, and indicative of his familiarity with the terrain during the period from 1933 to the year 1950, when he spent at least six months on the ground (Tr. 280-308), the witness answered that he, Gregory and Rueter (Rutter) examined the discovery work on the Kay Cooper claims (Tr. 310-311);

That they started on Kay Cooper No. 8, which is close to defendants' camp, and "That work that was done on No. 8, it was nothing but sand, like my No. 3 down there." (Tr. 311; 320-1);

"And No. 9 was in sand . . . and No. 10 is another one in sand."

The witness was then asked to state whether there was a lode in place in the discovery workings on any of the Kay Cooper Nos. 8, 9 and 10 claims, and answered:

"No, absolutely no." (Tr. 311).

The witness then testified that the Ray Ricketts Nos. 1, 2 and 4 were located by himself and Larry Prisk on February 8, 1951 (Tr. 313-316), described the monumenting and marking of boundaries on each claim (Tr. 316-318), and described in detail the discovery work performed by himself, Rueter and Dayton with the use of a compressor and jack hammer on

each claim and the exposure of a lode in place on each of those claims (Tr. 318-321).

The witness admitted failure of discovery on Ray Ricketts No. 3, that they never struck a lode, "Only the sand." (Tr. 320-1).

There were admitted in evidence Certificates of Location for Ray Ricketts Nos. 1, 2 and 4 (Defendants' Ex. G, Tr. 269-273) filed by the locators pursuant to sec. 4121 N.C.L. 1929;

The Certificate of Location for Ray Ricketts No. 1, recorded April 6, 1951 describes the discovery work as:

"The discovery work consists of an open cut located about 10 feet in a Northerly direction from the location monument and its dimensions are 6 feet wide, 50 feet long and 4 feet deep, exposing ledge, lode or vein in place."

and as having been completed since February 21, 1951.

The Certificate of Location for Ray Ricketts No. 2, recorded April 6, 1951, describes the discovery work as:

"The discovery work consists of an open cut located about 75 feet in an easterly direction from the location monument and its dimensions are 4 feet wide, 25 feet long and 4 feet deep, exposing ledge, lode or vein in place."

and as having been completed since March 29, 1951.

The Certificate of Location for Ray Ricketts No. 4, recorded April 6, 1951 describes the discovery work as:

“The discovery work consists of an open cut located about 75 feet in a southerly direction from the location monument, and its dimensions are 25 feet wide, 75 feet long and 2 feet deep, exposing ledge, lode or vein in place.”

and as having been completed since March 29, 1951.

G. F. Sturdevant, superintendent of operations for defendant Nevada-Pacific Development Corporation, testified at length on the discovery work performed under his supervision between March 3rd and 30th, 1951 (Tr. 360-368), which he described seriatim as:

Ray Ricketts No. 1: Installed a compressor, strung an airline (Tr. 364). Put two men to work with jack-hammer—excavated cut approximately 50 feet by 4 feet wide by 3 feet deep, exposing vein in place at bottom of cut, an exposure of scheelite (Tr. 366).

Ray Ricketts No. 2: Began work on March 3, 1951 (Tr. 360, 363-4). Installed compressor and air line. Followed scheelite exposure for 25 feet. Scheelite in bottom of hole and in bottom of whole trench. Dimensions of trench—twenty-five feet long, six feet wide and four feet deep (Tr. 363-4).

Ray Ricketts No. 4: Prisk, as an employee of Nevada-Pacific Development Corporation and under Sturdevant's direction, worked with a large tractor and blade rented from Wells Cargo Corporation. Ran an open cut approximately fifty feet long, twelve feet wide and three feet deep, exposing a lode or vein in place (Tr. 367).

This witness also testified that when the work had been completed on Ray Ricketts Nos. 1, 2 and 4, he moved the tractor to Ray Ricketts No. 3 claim "to see if we could find bedrock by the use of the tractor. There was a great deal of digging but it was all sand;" and that he "excavated a cut thirty feet long which exceeded eight feet in depth at the deepest part." (Tr. 368).

Charles E. Walton, employed as field man for Nevada-Pacific Development Corporation, testified that he first visited the property on March 19, 1951 (Tr. 370);

That shortly after he went on the ground he had occasion to do some work in the neighborhood of Kay Cooper Nos. 8, 9, 10 and 11, near the location work on those claims (Tr. 382);

That he checked the discovery work on Kay Cooper No. 8 and observed that it was in sand; and that he did not see a lode or vein in place in the discovery work on Kay Cooper No. 8 (Tr. 382);

That he had on frequent occasions from 1951 up to the time of trial observed the discovery work on Kay Cooper No. 8, over a radius of 150 feet from the location work and saw no evidence of other work at that time; that the only evidence in 1952 of any change was more falling-in from the sides and from the back of this particular cut; that he covered that area several times and there was no change (Tr. 383);

That he first saw the discovery work on Kay Cooper No. 9 in March, 1951, that there was not much evi-

dence of caving in the hole—just a little falling at the sides; that he had observed the location work frequently since that time; that in August, 1952, when the pictures were taken, there was a little more caving in the hole; that when he first saw the discovery work in March, 1951, there was no lode or vein in place at the bottom of the workings, only sand (Tr. 384-5); and

That he made an examination of the discovery work on Kay Cooper No. 10 early in 1951, about the same time he examined Kay Cooper No. 8 and Kay Cooper No. 9; that he did not observe any lode or vein in place, and that there was considerably more caving in the hole when the picture was taken in August, 1952 (Tr. 385-6).

This witness also testified that he again examined the Kay Cooper Nos. 8, 9 and 10 on November 11, 1953, cleaned out the holes to some extent and removed enough dirt to permit sinking drill holes to a depth of approximately five feet in the location work (Tr. 388-9); and that he used one $\frac{3}{4}$ " steel drill approximately 5 feet long and one $\frac{7}{8}$ " steel drill approximately $5\frac{1}{2}$ feet long (Tr. 389-390, 392).

The witness was then asked:

“Will you state whether or not it was necessary to hard rock these steels in; was it free?”

to which he responded:

“No, though at times they would go in fairly easy and we would have a tighter spot for an inch or two and go on through that. They were more

or less free, but we did use pipe wrenches to pull them out in some instances."

and then stated that the drills were driven the full length in each instance (Tr. 390).

Lee V. Dougan, as the only witness called by plaintiff in rebuttal, testified that he first visited "the property" in 1949 (Decoration Day), for one day and half a night; next about July 24, 1949 for a little over a week, again in August, 1949, and was on the property for J. L. Dougan when he had his option during the period from September 8, 1949 until June, 1950 (Tr. 395);

Supervised the work that was being done in trenches dug on Kay Cooper Nos. 8 and 2, and found ore in place (Tr. 397).

Visited the workings of Nevada-Pacific Development Corporation in 1953, which were on the same ground as Kay Cooper Nos. 8 and 2, and found veins in both of the workings of Nevada-Pacific Development Corporation, which were a continuation of the same veins he saw on Kay Cooper Nos. 8 and 2. "In fact, our B trench is right over their workings. That is just a short trench. We had just a little showing there and as they went down they opened up their ore and it is the same trench that goes in the south face of the A trench" on No. 8 (Tr. 398-9).

Called as defendants' witness Mr. Dougan then testified that he did not know when he first observed "that discovery work" (Tr. 400).

When asked the nature of the discovery work the witness answered "It is a pit—all I can say is that it was figured out better than 240 feet. That is, I didn't do the work I just told them I wanted that much work done and measured it by an engineer of mine afterwards;" and upon being asked if he is personally familiar with the location work (discovery work) on Kay Cooper No. 6, Kay Cooper No. 8, Kay Cooper No. 9 and Kay Cooper No. 10, the witness answered in the negative successively as to each and every claim (Tr. 401).

The concluding statement made by plaintiff's engineer, Lee V. Dougan, descriptive of the discovery work done pursuant to his orders on all of the Kay Cooper locations, between May, 1949 and June, 1950 demonstrates the inadequacy of such work for recognition as establishing legal discoveries on any of plaintiff's attempted locations.

2. PLAINTIFF HAS THE BURDEN OF PROVING A PRIOR LODE DISCOVERY ON EACH CLAIMED LOCATION.

The burden is upon plaintiff to establish that a vein or lode was discovered within the boundaries of the Kay Cooper Nos. 6, 8, 9 and 10, as required by R.S. sec. 2320 and that such vein or lode disclosed a deposit of mineral in place as required by sec. 4121, N.C.L. 1929, before the areas sought to be embraced in those purported locations were peaceably entered and relocated by defendants' grantors on February 8, 1951.

In consonance with the restrictive provision of Federal law, discovery of a vein or lode within the limits of the claim located is a fundamental requisite to the validation of a mineral location.

“In an action for the possession of a mining claim where the defendant is in actual possession the burden is upon the plaintiff to show that the prior location was made and perfected in compliance not only with this chapter, but also with any provisions of the statutes of the state not inconsistent with the United States statutes.”

Van Zandt v. Argentine M. Co., C.C.Colo. 1881, 8 F. 725, affirmed *Argentine M. Co. v. Terrible M. Co.*, 1887, 7 S.Ct. 1356, 122 U.S. 478, 30 L.ed. 1140.

And to same effect:

Cooper Globe M. Co. v. Allman, 1901, 64 P. 1019, 23 Utah 410, 417;

Bryan v. McCaig, 1887, 15 P. 413, 10 Colo. 309;
Sweet v. Webber, 1884, 4 P. 752, 7 Colo. 443, 450;

McCowan v. Maclay, 1895, 4 P. 602, 16 Mont. 234;

Hopkins v. Noyes, 1883, 2 P. 280, 4 Mont. 550.

“The burden of proving a prior discovery is on the party asserting it.”

Sands v. Cruikshank, 87 N.W. 589;

Dean v. Omaha-Wyoming Oil Co., 128 P. 881;

Jones v. Prospect Mountain Tunnel Co., 21 Nev. 339.

The question of what constitutes a vein or lode has been well defined by the Courts, federal and state.

“Rock or matter of any kind, in order to constitute a vein or lode within the meaning of this section, must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear.”

Grand Central M. Co. v. Mammoth Min. Co.,
1905, 29 Utah 490, 83 P. 648, error dismissed;
Mammoth M. Co. v. Grand Central M. Co.,
1909, 29 S.Ct. 413, 213 U.S. 72, 53 L.Ed. 702.

“In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, strained, and fissured material, or crushed and brecciated matter, characteristic of the district cannot be held to constitute a vein or lode, under this section, and in such case the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional bugg or fragment of ore, yet, where it is disconnected from any ore body, and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law.”

Grand Central M. Co. v. Mammoth Min. Co.,
supra.

“A vein cannot be said to exist merely because rock is crushed, shattered, or even fissured, and what constitutes a vein must depend somewhat

upon the nature of the country in which it is alleged to be found.”

Grand Central M. Co. v. Mammoth Min. Co.,
supra.

“A lode is a zone, belt or body of quartz or other rock lodged in the earth’s crust, and presenting two essential and inherent characteristics, viz: (1) It must be held ‘in place’ within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute.”

Meydenbauer v. Stevens, D.C. Alaska, 1897,
78 F. 787, 789, 791.

See also:

Consolidated Wyoming Gold M. Co. v. Champion M. Co., C.C.Cal. 1894, 63 F. 540, 544;

Jupiter M. Co. v. Bodie Consol., etc. M. Co.,
C.C.Cal., 1881, 11 F. 666, 675;

North Noonday M. Co. v. Orient M. Co., C.C.
Cal., 1880, 1 F. 522, 530;

Fitzgerald v. Clark, 1895, 42 P. 273, 17 Mont.
100, 136, 30 L.R.A. 803, 52 Am. St. Rep. 664;

Schreve v. Copper Bell Min. Co., 1891, 28 P.
315, 11 Mont. 309, 355.

“Not every crevice in the rocks, nor every outcropping on the surface which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great

value, can be adjudged a known vein or lode within the meaning of this section.”

Iron Silver M. Co. v. Mike & Starr, etc., M. Co.,
Colo. 1892, 12 S.Ct. 543, 143 U.S. 394, 401, 36
L.ed. 201;

Erhardt v. Boaro, Colo. 1885, 5 S.Ct. 560, 113
U.S. 527, 28 L.Ed. 1113.

“Mere indications of mineral, however strong, are not sufficient to answer the requirements of this section on the subject of discovery, either as to lode or placer claims.”

Iron Silver M. Co. v. Mike & Starr, etc., M. Co.,
supra;

See also:

Chrisman v. Miller, Cal. 1905, 25 S.Ct. 468, 197
U.S. 313, 323, 49 L.Ed. 770, affirming *Miller v. Chrisman*, 73 P. 1083, 74 P. 440, 140 Cal. 440, 98 Am.St.Rep. 63.

“Rock, whether brecciated or bedded, is not within this section, even when it is found between well-defined walls, unless it has been mineralized.”

Utah Consol. M. Co. v. Utah Apex Min. Co.,
C.C.A. Utah 1922, 285 F. 249, certiorari denied, 1923, 43 S.Ct. 362, 261 U.S. 617, 67 L.ed. 829.

It is also well established by high judicial precedent that no priority of location or right of exclusive possession inure to a location sans discovery.

“Priority of discovery gives priority of right against naked location.”

Cook v. Klonos, Alaska 1908, 164 F. 529, 537,
90 C.C.A. 403, modified on other grounds
C.C.A. 1909, 168 F. 700.

See also:

Belk v. Meagher, Mont. 1881, 104 U.S. 279, 26
L.Ed. 735;

Cook v. Klonos, Alaska, 1908, 164 F. 529, 536,
90 C.C.A. 403, modified on other grounds,
C.C.A. 1909, 168 F. 700, 94 C.C.A. 144;

Johanson v. White, Alaska 1908, 160 F. 901, 88
C.C.A. 83;

Bevis v. Markland, C.C.Wash. 1904, 130 F. 226;

Crossman v. Pendery, C.C.Colo. 1881, 8 F. 693;

Gemmell v. Swain, 1903, 72 P. 662, 28 Mont.
331, 98 AM.St.Rep. 570;

Garthe v. Hart, 1887, 15 P. 93, 73 Cal. 541;

Horswell v. Ruiz, 1885, 7 P. 197, 67 Cal. 111.

“Where an alleged locator has not made a discovery and has not retained possession for the purposes of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land while he is not actually working or occupying it.”

New England & Coalingo Oil Co. v. Congdon,
1907, 92 P. 180, 152 Cal. 211, 213.

“A competent locator has the right to initiate a valid claim to unappropriated public land by a

peaceable adverse entry thereon while it is in the possession of those who have no superior right to acquire the title or hold the possession.”

Thallman v. Thomas, Colo. 1901, 111 F. 277, 279, 49 C.C.A. 317.

See also:

Belk v. Meagher, *supra*;

Duffield v. San Francisco Chemical Co.,

Idaho, 1913, 205 F. 480, 123 C.C.A. 548; *San Francisco Chemical Co. v. Duffield*, Wyo., 1912, 201 F. 830, 834, 120 C.C.A. 160, certiorari denied 1913, 33 S.Ct. 464, 229 U.S. 609, 57 L.Ed. 1350;

Nevada Sierra Oil Co. v. Home Oil Co.,

C.C. Cal., 1889, 98 F. 673.

“Where there is no valid existing location upon mineral lands of the United States, any competent locator may enter even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no such right upon any such land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon.”

Atherton v. Fowler, Cal. 1878, 96 U.S. 513, 24 L.Ed. 732.

In performing the location work necessary to a valid discovery of a lode mining claim in Nevada, resort may be had to alternative methods of exploration:

(a) The locator must sink a discovery shaft four feet by six feet to the depth of at least ten feet "from the lowest part of the rim of such shaft at the surface or deeper, if necessary to show by such work a lode deposit of mineral in place"; or

(b) A cut or crosscut or tunnel which cuts a lode at a depth of ten feet; or

(c) An open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep.

The two alternatives are accepted as equivalent to the sinking of a discovery shaft, conditioned upon discovery of the lode deposit of mineral in place.

Under the first alternative it is definitely stated that the prescribed "cut" or "crosscut" or "tunnel" must also cut the lode at a depth of ten feet.

Where resort is had to the second alternative, it is equally clear that "an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep" necessarily implies that such work must be performed upon a ledge or lode of mineral in place outcropping at the surface. In the absence of such outcrop or exposure of the ledge or lode at the surface the open cut could not be excavated "along said ledge or lode," but would have to be excavated at depth in order to find it.

Any other construction of the "open cut" alternative would nullify Nevada's mandatory requirements for actual discovery, by extending recognition to any

type of sand hole, pit, trench or similar excavation in gravel, detritus or alluvium without regard to the existence of a lode deposit of mineral in place.

In a praiseworthy effort to exercise constructively the legislative power delegated by Congress for the exploration and development of mineral resources on the public domain, Nevada has enacted mining laws clarifying and defining the fundamental requirement that discovery is essential to the valid location of a mining claim. Enforced compliance by the Courts with those reasonable enactments both in Nevada and other States having similar regulatory laws, has demonstrated their efficacy in surmounting the "dog-in-the-manger" policy which formerly permitted segregation and withholding from the public domain of large areas of potential mineral lands by the simple expedients of alleged discoveries and minimum expenditures in so-called annual labor.

"An expectation is something more than a hope. A location made in the 'hope of finding some ore in it at some time' is worthless, unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common-sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein."

2 Lindley, 3rd Ed., pp. 770-1, citing:

King v. Amy & Silversmith M. Co.,

152 U.S. 222, 227, 14 Sup.Ct.Rep. 510, 38 L. Ed. 419, 18 Morr.Min.Rep. 76.

“To constitute a discovery the law requires something more than conjecture, hope or even indication.”

Id., citing:

Miller v. Chrisman, supra;

Erhardt v. Boaro, supra.

“Discovery of detached pieces of quartz, mere bunches, or ‘float’ is not sufficient.”

Id., p. 772, citing:

Jupiter M. Co. v. Bodie Cons. Min. Co., supra;

Book v. Justice M. Co., 58 F. 106, 120, 17 Morr.

Min.Rep. 617.

On the major issue of whether discovery was made on plaintiff's locations, Kay Cooper Nos. 6, 8, 9 and 10, it is quite significant that after holding all of those locations under option from September 8, 1949 to June 30, 1950 (Plaintiff's Ex. 3-6), plaintiff's witness and predecessor in interest, J. L. Dougan, surrendered his option because of his disappointment with the property. That explanation of his relinquishment was not furnished by Mr. Dougan personally, but by plaintiff's witness Carl Harry Cooper, who testified that on June 29, 1950:

“Mr. Dougan informed me that the property was being turned back. It didn't stand up to his expectations of ore being there and he turned the property back.” (Tr. 132.)

That admission of lack of ore by plaintiff's own witness, and the only person, (other than defendants), shown to have made any substantial effort toward

discovery, stands in the record undenied and unexplained.

Dougan's relinquishment on June 30, 1950 was followed by plaintiff Gustin's acquisition of the property on December 4, 1950 (Plf's Ex. 9, Tr. 74). There is no evidence that any further exploratory work was performed by any person on the Kay Cooper locations subsequent to June 30, 1950, or at any time thereafter until defendant Nevada-Pacific Development Corporation's entry on the Ray Ricketts Nos. 1, 2 and 4 claims on February 8, 1951.

In contradistinction to the paucity of factual evidence of separately identified discoveries on each of plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 locations, defendants fully supplemented the information furnished in their Certificates of Location for Ray Ricketts Nos. 1, 2 and 4 claims (Defts' Ex. G) with positive testimony of an actual discovery made on each of those claims (Tr. 318-321; 360-368).

In so doing, defendants' witnesses frankly admitted that there was no valid discovery made on defendants' Ray Ricketts No. 3 location and that recurrent efforts to expose a vein or lode of mineralized rock in place on that location showed "only sand" (Tr. 320-1; 368).

Defendants' proof of separate and distinctly identified discoveries made on their Ray Ricketts Nos. 1, 2 and 4 claims conforms with the Federal requirement for discovery of a "vein or lode" (R.S. 2320), and also with Nevada's requirement for discovery of "a lode deposit of mineral in place." (Sec. 4121,

N.C.L. 1929). No attempt was made by plaintiff to traverse the testimony of defendants' witnesses on the actuality of those discoveries.

Agreeable to standard practice in conflicts affecting title to mining locations, defendants have assumed and discharged the burden of proving their own superior title to all of the lands embraced in their Ray Ricketts Nos. 1, 2 and 4 lode mining claims (*U. S. Comp. St. sec. 4625; 30 U.S.C. sec. 32, p. 303; 3 Lindley 3rd Ed., p. 1862; Tonopah Ralston M. Co. v. Mt. Oddie M. Co., 49 Nev. 420, 248 P. 833*).

3. FINDINGS OF THE COURT BELOW VALIDATING PLAINTIFF'S KAY COOPER NOS. 6, 8, 9 AND 10 MINING LOCATIONS AS SUPERIOR IN PART TO DEFENDANTS' RAY RICKETTS NOS. 1, 2 AND 4 MINING CLAIMS, AND INVALIDATING DEFENDANTS' RAY RICKETTS NO. 2 MINING CLAIM IN TOTO, ARE CLEARLY ERRONEOUS.

Admittedly, where there is evidence sufficient to support the findings and judgment of the Court below, they will not be set aside unless clearly erroneous, or where it clearly appears that the Court below misconstrued the evidence in its relation to the governing law. In the case at bar, there has been a misconception by the trial Court of the imperative essentials of a valid discovery under both Federal and State mining laws.

In assigning error in the findings of the Court below, we do so with due regard to the restrictive provision of the Rule (52a F.R.C.P.) against setting aside the trial Court's findings "unless clearly erroneous", but also the mandate of the Rule-Making Act

abolishing the distinction between law and equity practice and defining certain functions of Appellate Courts as promoting justice on the facts of particular cases and establishing general uniformity in law (3 *Moore's Fed. Pr.*, sec. 52.01, p. 3118).

The amended section of Rule 52(b) provides that in cases tried to the Court without a jury, the question of sufficiency of the evidence to support the findings may be raised with or without objection to such findings and with or without motion to amend or motion for judgment in the Court below (*U. S. S. Ct. Digest, "Court Rules,"* p. 244 and cases cited).

It is established by an overwhelming preponderance of the evidence that neither plaintiff's grantors or predecessors, or plaintiff himself, made a discovery on Kay Cooper Nos. 6, 8, 9 and 10 locations within the prescribed period of 90 days from the date of their several locations, and had not made such discovery on any of said purported locations at the time defendants' grantors relocated the Ray Ricketts Nos. 1, 2 and 4 lode mining claims on February 8, 1951.

In the absence of actual discovery of a mineral lode or vein in place, within the purview of Federal and State laws, the lands sought to be embraced in those attempted locations were still part of the unappropriated public domain, and open to peaceable entry and subsequent relocation by defendants' grantors.

Hence defendants earnestly contend that the findings and decision of the Court below are unsupported by the evidence, are contrary to the evidence and against law.

The situation presented in the case at bar is demonstrably such as is within contemplation of the exception reserved in Rule 52a.

“Supreme Court must on appeal correct clear error even in findings of fact.”

U. S. v. Yellow Cab Co., Ill. 1949, 70 S.Ct. 177,
338 U.S. 338, 94 L.Ed. 150.

“Under this rule a finding of fact is ‘clearly erroneous’ if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence.”

Fleming v. Palmer, C.C.A. Puerto Rico, 1941,
123 F. 2d 749, certiorari denied 62 S.Ct. 942,
316 U.S. 662, 86 L.Ed. 1739.

“Under subdivision (a) of this rule, a finding is ‘clearly erroneous’ when although there is evidence to support it reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed.”

U. S. v. U. S. Gypsum Co., 1948, 68 S.Ct. 525,
333 U.S. 364, 92 L.Ed. 92, rehearing denied
68 S.Ct. 788, 333 U.S. 869, 92 L.Ed. 1147.

“When there is a misapprehension of the evidence by the district court and its decision is so clearly erroneous that it is against the truth and right of the case, the Court of Appeals may give effect to its own conclusions.”

Special Service Co. v. Delaney, C.A. La., 1949,
172 F. 2d 16.

“A trial Court’s fact findings are clearly erroneous, as required by federal civil procedure rule

for appellate court to set them aside, when not supported by substantial evidence, contrary to clear preponderance of evidence, or based on erroneous view of law.”

Magidson v. Dubban, C.A. Mo., 1954, 212 F. 2d 748.

“The rule that a reviewing court will not disturb findings of fact made by trial judge unless they are clearly erroneous does not apply if he has committed error of law which has manifestly influenced or controlled his findings of fact, such as mistake as to burden of proof.”

Owne v. Commercial Union Fire Ins. Co. of New York, C.A. Md. 1954, 211 F. 2d 488.

It is respectfully submitted that the judgment of the Court below should be reversed, insofar as and to the extent that said judgment operates to vest title in plaintiff to those parts or portions of Kay Cooper Nos. 6, 8, 9 and 10 locations which overlap or are in conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims, and to deny defendants' title to said conflict areas, and to deny defendants' title to all of the lands embraced in said Ray Ricketts No. 2 lode mining claim.

Dated, Reno, Nevada,
February 25, 1955.

WALTER ROWSON,
Of Counsel for Defendants
(Appellants).

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United States Court of Appeals

NINTH CIRCUIT

NEVADA-PACIFIC DEVELOPMENT CORPORATION,
V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A.
PRISK, BILL GREGORY, D. HULBERT and
GEORGE N. TAUSAN, APPELLANTS,

— vs. —

HARLEY W. GUSTIN, APPELLEE

Appeal from the United States District Court
For the District of Nevada

BRIEF OF APPELLEE

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Salt Lake City 1, Utah

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FILED

MAR 28 1953

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United States Court of Appeals

NINTH CIRCUIT

No. 14553

NEVADA-PACIFIC DEVELOPMENT CORPORATION,
V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A.
PRISK, BILL GREGORY, D. HULBERT and
GEORGE N. TAUSAN, APPELLANTS,

— vs. —

HARLEY W. GUSTIN, APPELLEE

Appeal from the United States District Court
For the District of Nevada

BRIEF OF APPELLEE

STATEMENT OF THE CASE

While the appellants thoroughly outline the pleadings in the matter they avoid stating the factual premise of the judgment appealed from. Appellee deems it necessary to place before the court that which appellants seemingly have avoided. (References hereafter made are to the pages of the printed Transcript of Record).

Three sets of claims were originally involved in the action, the Ray Ricketts 1 to 4 inclusive purportedly located by Bill Gregory in 1947, the Kay Coopers 1 to 11 inclusive located by R. C. Peterson and Carl Harry Cooper commencing in June 1948 through September 30, 1949, and finally the Ray Ricketts 1 to 4 inclusive located by Prisk and Hulbert in February 1951. The trial court found the 1947 Ray Ricketts locations to be void for failure to file certificates of locations within the statutory time (Tr. 49-50), and found the Kay Coopers 1 to 5 inclusive to be void for the same reason (Tr. 47-48). Appellants apparently contend that there is no evidence in the record upon which the court could find a discovery of ore in place on Kay Coopers 6, 8, 9 and 10. There is no challenge on this appeal as to the finding of the trial court that the 1947 Ray Ricketts locations are void and the locations of the Kay Coopers 1 through 5 are likewise void.

There is no contention upon the part of the appellants that the Kay Cooper claims 6, 8, 9 and 10 were improperly marked and monumented. The Kay Coopers and the 1951 Ray Ricketts, while not similar as to claim lines, cover substantially the same ground, the four Ray Ricketts being within the area covered by the eleven Kay Coopers and conflict in area as set forth by appellants on page 7 of their brief. Both sets of claims are alleged to be based upon a discovery of tungsten ore and both claimants are of necessity claiming the same lode or vein. The record discloses that Peterson and Cooper in 1948 and 1949 located the Kay Coopers on ground which was open to location, which fact the trial court found to be true (Tr. 47), and from which finding appellants do not appeal.

THE QUESTIONS INVOLVED

There is but one primary question, namely: whether there is sufficient evidence in the record showing a discovery of mineral in place on the Kay Cooper claims numbered 6, 8, 9 and 10 in support of the affirmative findings of the trial court in that regard.

We will first point to the portions of the record which sustain the trial court's findings of a valid discovery on those of the Kay Cooper claims that are in issue, and we will then attempt to counter the arguments made by appellants.

ARGUMENT

(a) Evidence of Discovery on the Kay Coopers.

R. C. Peterson, Carl Harry Cooper and Albert Brown testified in detail with regard to the discoveries and discovery work on the Kay Cooper claims, the testimony being that they lamped the area with fluorescent lamps where they found tungsten outcroppings, marked such findings and on the next day returned to the ground, erected monuments and commenced discovery work (Tr. 121, 122, 181, 182). The discovery work on each of the claims consisted of a trench in excess of 240 cubic feet (Tr. 123, 129, 182). The locators testified that as to each claim they found mineral in place. On direct examination, on the question of discovery of ore, witness Cooper testified:

“Q. Now referring to the claims Nos. 6 to 11, did you find ore on those?

A. We found ore, yes, sir.

Q. And what was the nature of that?

A. It was tungsten, scheelite.

Q. And where did you find it?

A. In the location cuts." (Tr. 129)

On direct examination the witness R. C. Peterson corroborated the discoveries made on the claims:

"Q. Can you state as to Kay Cooper No. 1 whether you found tungsten in the discovery cut?

A. We found scheelite in the discovery cut.

Q. As to the rest of Kay Cooper Nos. 2 to 5, did you find tungsten?

A. We found mineral in all of them.

Q. Now calling your attention to Kay Cooper Nos. 6 to 11, did you participate in the discovery work on each of those claims?

A. I did." (Tr. 184-185).

Appellants point to the testimony of R. C. Peterson on cross examination to dilute the fact of discovery. Mr. Peterson testified that he was a miner, engaged in that occupation since 1918 and had been prospecting for all kinds of minerals since that time (Tr. 180-181). Appellants take out of context Mr. Peterson's testimony on cross examination in an effort to tie a typical "hard rock miner" to the refinement of a technical definition capable only of a schooled engineer. Mr. Peterson testified as follows:

"Q. Now will you say, from your own knowledge, that in each of the 11 holes a lode or vein in place was exposed?

A. I couldn't make a statement of that kind because I am not an engineer. There was mineral present in each hole.

Q. You know the difference between placer and rock in place, do you not?

A. I know that, yes.

Q. All right. Will you say then that in each one of the 11 holes there was rock in place and mineral in that rock?

A. I couldn't state that, not at the present time.

The Court: Is there any question as to whether or not there was discovery of mineral?

Mr. Ross: That is correct.

A. There was a discovery of mineral on all claims." (Tr. 190-191).

The discoveries and the discovery work accomplished by the locators was further verified and corroborated by witness Victor E. Peterson. On direct examination, in response to a question by the court, Mr. Peterson, an engineer and geologist, testified:

"The Court: That would apply to all of the —

A. That would not apply to all of them. Of course, in the case of No. 8, there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the south, in what might be called reconsolidated matter, that is open to question." (Tr. 212-213).

The above answer was given after Mr. Peterson had testified that they found mineral in place on all the claims (Tr. 211). In explanation of his answer Mr. Peterson attempted to give a technical definition of mineral in place but never departed from his statement that there was a discovery of scheelite in place on all of the claims.

On rebuttal the witness Lee D. Dougan, an engineer, confirmed, without contradiction in the record, that the claimants of both groups of claims were locating the same vein or lode.

“Q. Now I will ask you, Mr. Dougan, in your opinion is the vein exposed by the workings by the Nevada-Pacific the same vein which you testified you saw in the workings of the Kay Cooper people that you supervised, Trenches A, B, —

A. There is no question about it. It is a continuation. In fact, our B trench is right over their workings. That is just a short trench. We had just a little showing there and as they went down they opened up their ore and it is the same trench that goes in the south face of the A trench.

Q. And that is on No. — A. No. 8.

Q. And is that the same on No. 2?

A. I think that is the same on No. 2.

Q. Now other than the workings on the Nevada-Pacific that you have described on No. 2 and No. 8, are there any other substantial workings of the Nevada-Pacific on Kay Cooper claims?

A. No.” (Tr. 398-399).

In addition to the discovery work done by the locators the witness J. L. Dougan testified that he expended some \$20,000.00 in connection with the property between September 8, 1949 and the early part of April 1950, which expenditures included \$10,000.00 paid to the locators for options and the immediate right of occupancy and possession of the claims (Tr. 88). He further testified that by the use of a radiant lamp he observed tungsten and the occurrence of mineralization (Tr. 83, 89).

Witness Federhoff, a driller for Boyle Bros. Drilling Company, under contract with J. L. Dougan, drilled from 700 to 800 feet of drill holes during the months of February and March 1950 (Tr. 76-77), which drill holes are shown and recorded on Exhibit 18.

The evidence required to prove a discovery is clearly expressed in *Lindley on Mines*, Vol. 2, 3rd Ed. at page 767:

“Slight evidence on the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of location, when clear and convincing proof would be required to establish the existence of a ‘known vein’ within a prior townsite or placer patent.

The supreme court of the United States clearly recognizes the distinction between the two classes of cases, by intimating that the land officers might, on a *prima facie* case, decide the right of an applicant to a vein or lode and issue a patent therefor, upon proof less conclusive than would be required where a conflict arises between a prior placer and subsequent lode patent.”

This court, consistent with the fundamental rule, has repeatedly held that where there is substantial evidence to support the version chosen by the trial court of the testimony, and the permissible inference from documentary evidence and admitted facts, the requirements of the Federal Rules are met. See *Gamewell Co. v. City of Phoenix* (C.C.A. 9th), 216 F. 2d 928.

(b) *The Conflict of Testimony between the Parties.*

The interest of appellants in the property came to light on June 29, 1950 when defendant Hulbert demanded of Cooper one-half of a payment of \$17,500.00 which he

thought was to be paid to Cooper under the options of Mr. J. L. Dougan (Tr. 130-131). Shortly thereafter the appellants, by trespass and against the demands of Cooper, occupied the property (Tr. 138). The appellants thereafter remained on the ground contrary to all right and, on that basis, located the Ray Ricketts 1 to 4 in February of 1951. The 1951 locations were relocations of the original Ray Ricketts claims with the numerical designation the only change.

The gist of appellants' contention of a lack of discovery on the Kay Cooper claims is stated on page 48 of their brief:

“In the case at bar, there has been a misconception by the trial Court of the imperative essentials of a valid discovery under both Federal and State mining laws.”

Succinctly stated, counsel for the appellants mean the trial judge believed the wrong witnesses. It is fundamental that the trial court is free to choose between alternative versions of testimony and weigh more heavily for one party than the other. *Gamewell Co. v. City of Phoenix*, supra; *U. S. v. Yellow Cab*, 338 U. S. 338, 70 S. Ct. 177, 94 L. ed 150.

The appellants' witnesses, all of whom were directly interested in the outcome of the litigation, testified with a certainty rarely found that they had examined the workings of the Kay Cooper claimant and failed to find anything but sand, in spite of the fact that they were claiming the same ground and the same ore by reason of alleged valid discoveries made on the locations of the Ray Ricketts claims in 1951. The extreme nature of the proof offered to discredit the Kay Cooper locations is illustrated

by the testimony of appellants' witness Walton, who testified on direct examination that during the course of the trial he went to the property and probed the Kay Cooper locations with steel drills three-quarters of an inch in diameter, and while he stated that he did not find hard rock he did admit that the drill hit tight spots and had to be removed with pipe wrenches (Tr. 388-390). This testimony was five years after the location work done by the Kay Cooper claimant and was in an area of high erosion and drifting of sands which deposited considerable loose material in the cuts and trenches made by the Kay Cooper claimant. Typical of the extreme nature of the appellants' testimony is illustrated by the witness Hulbert, who testified as follows:

“Q. Now as a result of that examination, will you state whether or not there was a lode in place in the discovery workings on any of those claims, Kay Cooper 8, 9, 10 and 11?

A. No, absolutely no.” (Tr. 311).

The question of credibility was the principal issue before the trial court. Appellants' authorities as to what constitutes mineral in place are agreed to by appellee. The real point is not a refinement of definition as to what constitutes a discovery of mineral in place but whether or not a genuine discovery has been made. In *Lindley on Mines*, Vol. 2, 3rd Ed., page 772, the author effectively states this proposition:

“While the courts may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham.”

Appellants on page 46 of their brief point to the relinquishment of the options by Mr. Dougan as substantiation that ore was not discovered by the Kay Cooper locators. They also point to a failure to prove assay reports as showing a failure to discover ore. It is doubtful that appellants contend that quality or quantity of the mineralization has any importance in the making of a valid discovery.

Fox vs. Myers, 29 Nev. 169, 86 P. 793:

“ * * * The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes (U. S. Comp. St. 1901, p. 1424) has been decided by many courts. All the authorities cited by appellants are referred to in *Book v. Mining Co.* (C. C.) 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.’ ”

It must be kept in mind that in the instant case the claimants to the two groups of claims are both claiming under lode locations based upon a discovery of tungsten ore and claiming the same lodes and veins. It is well

established that in such a case the courts have liberally construed the requirements of discovery. *Lindley on Mines*, Vol. 2, 3rd Ed., page 766:

“The fact is, that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein, or lode, between different claimants of the same lode under section twenty-three hundred and twenty of the Revised Statutes, on the one hand, and a ‘lode known to exist’ within the limits of a placer claim at the time the application is made for a patent therefor under section twenty-three hundred and thirty-three, on the other.”

In such a case as presented here the Ray Ricketts claimants are re-locators and not original discoverers, and in a contest between the junior and senior locators the courts do not examine the evidence of the senior discovery with very great strictness. *Ambergris Mining Co. v. Day*, 12 Idaho 108, 85 P. 109:

“Where one miner has discovered what he considers mineral indications and deposits, and has followed up that discovery by staking the claim and doing the necessary location work, and another miner comes along and makes a discovery, and locates a part or all of the same ground covered by the former location, and thereupon goes into court to contest the senior location, and in order to sustain that contest shows that the ground does in fact contain valuable mineral deposits, as contemplated by section 2320 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1424), and at the same time contends that the senior locator had not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness.”

In determining whether findings of fact are clearly erroneous the reviewing court will consider the evidence and such reasonable inferences as may be drawn therefrom in the light most favorable to appellee, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Wheeler v. Holland*, (C.C.A. 5th), 218 F. 2d 482.

CONCLUSION

We have pointed to a sufficient portion of the record to demonstrate, we believe, that the learned trial Judge did not misconceive the essentials of discovery to support a valid lode mining claim under the laws of the United States and of the State of Nevada. Enough has been said to demonstrate that the findings are supported by the evidence. The legal and factual premise of a valid location of the Kay Cooper lode mining claims 6, 8, 9 and 10 finds ample support in the proceedings and actually there is nothing else to be said of appellants' appeal, as by all of the authorities the findings of the lower court will not, therefore, be disregarded.

The judgment appealed from should be affirmed.

Respectfully submitted,

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No. 14,553

United States Court of Appeals
For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPO-
RATION, V. E. WILLEY, G. F. STURDE-
VANT, C. FITCH, L. A. PRISK, BILL
GREGORY, D. HULBERT and GEORGE N.
TAUSAN,

Appellants,

VS.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

REPLY BRIEF OF APPELLANTS.

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United States Court of Appeals For the Ninth Circuit

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Appellants,

vs.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

REPLY BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

Contrary to the assertions made by appellee in his Statement of the Case, to the effect that appellants have avoided the factual premise of the judgment appealed from, our opening brief is replete with pointed recitals of the identical question posed by appellee, and as connoted by that judgment.

The primary issue, lack of a valid discovery on any of the disputed Kay Cooper locations, is repeatedly stressed: first, as the fundamental question

in our Statement of the Case (Op. Br. pp. 5 and 7); next in the 2nd, 3rd, 4th, 7th and 11th Specifications of Errors (Op. Br. pp. 8, 9, 10 and 12); again in the Summary of Argument (Op. Br. pp. 12, 13 and 14); and recurrently throughout the Argument in reviewing the evidence of appellee's witnesses (Op. Br. pp. 14-29).

THE QUESTIONS INVOLVED.

Admittedly, one primary question is presented for review: that of discovery, or the lack of it on each of appellee's disputed locations. Determination of that question essentially involves, however, the consideration of three elements: (1) sufficiency of the evidence to support the findings; (2) whether the findings are contrary to the clear weight of the evidence; and (3) whether the trial Court's conclusion on the evidence has been arrived at by a wrong conclusion of law.

ARGUMENT.

(a) LACK OF DISCOVERY ON KAY COOPER LOCATIONS.

The quoted excerpts from testimony given by appellee's witnesses R. C. Peterson, Carl Harry Cooper and Albert Brown (Ans. Br. pp. 3-7) add nothing to counteract appellee's failure to prove valid discoveries on the Kay Cooper locations, already covered in appellants' opening brief (pp. 21-24).

Lamping the area with fluorescent lamps and finding outcroppings, unless followed by the exposure of

a vein or lode of mineralized rock in place, and not by the perfunctory excavation of a 240 cubic foot trench, do not fulfill the requirements, either Federal or State.

The mere finding of ore "in the location cuts," or "scheelite in the discovery cut," or "mineral in all of them" is too nebulous to be seriously considered, in the absence of positive evidence that those mineral showings were actually in a vein or lode in place.

The sum and substance of testimony furnished by Carl Harry Cooper is that he and his co-locator R. C. Peterson excavated 240 cubic feet "on each of those claims" (Op. Br. p. 22; Tr. p. 129).

R. C. Peterson also testified that he was assisted by Albert Brown after first describing the discovery work on Kay Cooper No. 1 as "a hole in the ground," which "measured over 240 cubic feet of ground removed." This witness stated that the work was done with pick and shovel "all run by hand;" that they used some powder but did no drilling (Tr. 183). The witness then testified that the "same identical procedure was followed on all claims" (Tr. 184).

As a miner and prospector of more than thirty years' experience, we may reasonably assume that this witness could have given positive testimony as to the discovery work performed on Kay Cooper Nos. 6, 8, 9 and 10 had the facts so warranted.

The character of the initial and merely token attempts of the locators to effectuate valid discoveries on the "Kay Cooper Nos. 6 to 11" is demonstrated by

the witness's description of the discovery work as "open cuts and such as that" (Tr. 185).

When J. L. Dougan acquired his option on the Kay Cooper property on September 8, 1949, R. C. Peterson was employed under Lee Dougan's supervision for about six weeks, until some time in October, 1949, "prospecting and running cut on the side hills" (Tr. 186-7). "We run a cut of considerable length and I would say about four feet in depth, using a jack hammer and powder" (Tr. 187).

Laboring under the same aura of vague uncertainty, and when asked to indicate on Plaintiff's Ex. 17 where the work was done, the witness first pointed to Kay Cooper No. 8, then indicated Kay Cooper No. 2, and upon being asked the direct question: "Did you work down in No. 8 at all?" answered: "I don't believe I did. The work was started after I left there." (Tr. 187-8).

On cross-examination this witness testified that he did not believe that all of the discovery holes "on the entire 11 claims" were in rock formation, and was unable to identify those that were. He stated: "There was mineral present in each hole," but could not state that there was mineralized rock in place in each hole (Tr. 190). On re-direct examination the witness stated that scheelite he found was in a granite formation, "more or less decomposed." (Tr. 194).

As noted in our opening brief (pp. 27-8) Albert Brown's testimony omitted to mention the Kay Cooper Nos. 6, 8, 9 and 10.

In the absence of evidence of a prior valid discovery by appellee's locators, Lee D. Dougan's opinion evidence that both claimants "were locating the same vein or lode" did not merit contradiction in the record. Mr. Dougan was not familiar with the discovery work on any of the Kay Cooper locations (Op. Br. 37; Tr. 400-1).

Except for an affirmative answer to the question: "Now in those trenches that you have testified to on Kay Cooper No. 8 and Kay Cooper No. 2, did you find ore in place?" (Tr. 397), Mr. Dougan furnished no further evidence of discovery. He was not asked, and volunteered no information as to such essential characteristics as to whether the "ore in place" was in a vein or lode of mineralized rock in place, contained within walls; or, of even greater importance, at what depth ore was exposed in the trenches.

Testimony that those trenches "figured out better than 240 feet," in accordance with Mr. Dougan's instructions (Tr. 401), is no evidence of compliance with the legal requirements for discovery, Federal or State. While doubtless intended to supplement the precedent and defective discovery work attempted by the co-locators Cooper and Peterson, there is a continuing absence of material evidence that those subsequent efforts effectively meet the requirements.

It is elementary that priority of discovery confers the prior right and that unless discovery has been timely accomplished formal acts of location confer no right of possession to the exclusion of one who enters

on the ground peacefully for the purpose of making a discovery (Op. Br. 41-43).

The inconsequential testimony of J. L. Dougan regarding his abortive expenditures of money, his "observation of tungsten and the occurrence of mineralization," as also the incomplete testimony of Joe Federhoff on his similarly abortive "drill holes" are sufficiently covered in our opening brief (18-21).

Appellee's geologist, Victor E. Peterson, testified on direct examination that he could not say that in some instances, whether or not the ore was in place, and stated:

"Now that is true in the case of the ore in the vicinity of the Kay Cooper No. 8, where I cannot say definitely whether it is transported material or is the result of residual weathering, whereby it is possible to develop material of granular nature strictly through weathering, through no transportation, so as to say whether or not we found ore in place in some instances, I do not know for sure without further investigation." (Tr. 212).

Although Mr. Peterson essayed to testify as an expert mining witness, his technical training and major field activities appear to have been more directly concerned with civil engineering and oil geology. Mr. Peterson is the only witness who attempted to furnish specific evidence of discovery on the Kay Cooper locations, and appellee is bound by his doubts and misgivings as to whether, in some instances, the ore is in place, and particularly by his

negative testimony in relation to Kay Cooper No. 8 as quoted supra. It is clear from the modifying and frank admissions of this witness that he was not qualified to furnish positive and affirmative evidence on the discovery of a mineralized vein or lode of rock in place and at depth, as to any of the Kay Cooper locations "without further investigation." (Tr. 212).

The defective weaknesses already noted in Mr. Peterson's testimony are neither explained away or strengthened in his answer to the trial Court's unfinished question as to whether the presence of tungsten in the discovery cuts "would apply to all of the—(claims)."

In answer to that question the witness testified:

"Of course, in the case of No. 8 there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the South, in what might be called reconsolidated matter, that is open to question." (Tr. 212-213).

Whether inadvertently or otherwise, throughout his testimony this witness made no statement indicating that either the "mineral in place" or the "showing on the rock" were disclosed in a vein or lode in place, or that such exposures were contained within clearly defined boundaries or walls separating them from the country or non-mineral rock.

The mass of the mountain may be, and frequently is, composed of granitic rock, but to constitute a vein

or lode it must be distinguishable from such mass, whether granitic rock, country rock or any other mass formation. For all that appears in evidence to the contrary, the granitic rock mentioned by Mr. Peterson may be either "rock of the mountain" or "country rock." R.S. 2320 does not contemplate that a valid location may be made of granitic rock any more than it may be made of rock of the mountain or country rock consisting of quartzite, limestone or other similar material, unless a vein or lode in place is first discovered in such granitic rock, and contained in well-defined walls. "Decomposed granite" and "microscopic amounts of scheelite occurring in this granitic rock", (Tr. 211-212) cannot be accepted as mineralized rock in place, unless shown conjunctively with a vein or lode. As we have stated, the existence of a vein or lode is nowhere mentioned by this witness.

Indications of mineralization over a wide area, and not specifically identified as within the boundaries of a designated mining location, fall far short of establishing a valid discovery on any attempted location sought to be protected by such blanket efforts.

We respectfully reiterate that such showings, whether on the surface or below the surface, in the absence of testimony that the mineralized rock was contained in a lode or vein in place, do not meet the requirements for discovery of a mineralized vein or lode under Federal law, or for the discovery of "a lode deposit of mineral in place" under Nevada law (Op. Br. p. 28).

It is quite evident that the limited time spent on the property examining not only the original Kay Cooper group of eleven locations, but also the whole adjacent area was insufficient to enable Mr. Peterson to give positive testimony on the material question of whether a vein or lode in place was actually discovered on any of the Kay Cooper locations now in controversy. As a geologist and surveyor, Mr. Peterson's professional interest and activities were devoted to exploring the economic possibilities of the entire area rather than in concentrated attention on the mineral characteristics of the discovery work on any particular claim. Furthermore, Victor E. Peterson's expert testimony must be considered with the layman testimony of one of the locators, R. C. Peterson, in relation to Kay Cooper Nos. 6 to 11, that "he couldn't say for sure" whether there was a mineralized vein in each discovery hole (Tr. 190-1), and that of the co-locator Carl H. Cooper.

Mr. Cooper testified on direct that he did the location work on the Kay Cooper Nos. 6 to 11 and that he found ore in each of the 240-cubic foot open cuts (Tr. 129), but on cross-examination stated that R. C. Peterson and Albert Brown did the actual work (Tr. 165); "I may have helped, I don't remember exactly." (Tr. 166).

The evidence presented by appellee's supporting witnesses on the question of discovery falls short of meeting, or even approximating, the essential elements noted in any of the controlling decisions definitive of what constitutes a vein or lode of mineralized rock in place. Nor does such evidence of discovery

substantially conform with the express provisions of the Nevada statute (Sec. 4120, N.C.L. 1941 and Sec. 4122 N.C.L. 1929), or with the well-known custom of miners in the absence of such regulatory provisions.

“Minor amounts of scheelite occurring in this granitic rock,” and ore composed of transported material, or resulting from residual weathering, mentioned by Mr. Peterson in explaining his lack of assurance that there is ore in place in the vicinity of Kay Cooper No. 8 (Tr. 212), cannot be regarded under any of those hypotheses as indications of a discovery in a vein or lode.

The essential characteristics of a “vein or lode” as contemplated by Federal law, are defined in the authorities cited in our opening brief (pp. 39-41, 45-46), to which may be added:

“A deposit of calcium phosphate lying in veins or beds of various thickness, having a dip and strike, between solid and clearly defined walls of limestone, is a vein or lode of rock in place within the meaning of Rev. St. sec. 2320, and subject to entry thereunder only as a lode claim.”

Duffield v. San Francisco Chemical Co., 205 F. 480, 123 C.C.A. 548.

“‘Lode’ as the term is used in mining law, means a fissure between well-defined boundaries, containing ore, even though the ore is found at considerable intervals and in small quantities.”

U. S. v. King, 9 Mont. 751, 22 Pac. 499.

“‘Vein’ or ‘lode’ is mineral-bearing rock or other earthy matter in place in a fissure in rock,

so that its boundaries are sharply defined by rock walls in place.”

Webb v. American Asphaltum Min. Co., Colo.,
157 F. 203, 84 C.C.A. 651.

“A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form; before it can legally and rightfully be denominated a ‘lead’ or ‘lode’ it must have length and width and depth. It must be capable of measurement, and must occupy definite space, and be capable of identification; and before a lode can be called a ‘discovery’ at least one well-defined wall or side of the lode must be found.”

Foote v. National Min. Co., 2 Mont. 402, 404.

Mr. Justice Field, in the Nevada case of *Eureka Cons. Mining Co. v. Richmond Mining Co.* (8 Fed. Cas. 819), defines a lode to be “a zone or belt of mineralized rock and lying within boundaries clearly separating it from the neighboring rock.”

Excepting for the “showing on the rock, on the surface” on Kay Cooper No. 8, there is no evidence anywhere in the record to indicate at what depth “in the discovery cuts” mineralized ore was encountered, in place or otherwise.

In order to meet the Nevada requirements for discovery, mineralized showings on the surface must be developed by exploration at depth, either by sinking a shaft or by any one of the prescribed equivalent alternatives (Op. Br. pp. 43-45).

The words “in place,” as applied to mineralized rock within the purview of Federal law (R.S. 2320),

and Nevada law (sec. 4120, N.C.L. 1941 Supp.) means "in situ," i.e. mineralized rock contained in a vein or lode, as distinguished from placer or other deposits.

R.S. 2320 (Op. Br. p. 15) authorizes the location of mining claims "upon veins or lodes of quartz or other rock in place bearing gold . . . or other valuable deposits" upon discovery of "the vein or lode" within the limits of the claim located.

"The phrase 'in place' as used in Act of Congress, May 10, 1872, in relation to mining claims, in speaking of veins or lodes of quartz or other rock in place indicates the body of the country which has not been affected by the action of the elements, which may remain in its original state and condition, as distinguished from the superficial mass which may lie above it."

Stevens v. Williams, 23 Fed. Cas. 44.

Sec. 4120 of the Nevada law likewise authorizes a qualified locator "who discovers a vein or lode" to locate a mining claim thereon. Sec. 4121 N.C.L. 1929 (Op. Br. pp. 15-16) prescribes that within ninety days after posting his location notice the locator must sink a discovery shaft, or its equivalent, of sufficient depth to show by such work "a lode deposit of mineral in place."

"No valid location of a mining claim can be made until a vein, or deposit, of gold, silver, or metalliferous ore, or rock in place has been discovered."

Overman S. Min. Co. v. Corcoran, 15 Nev. 147,
1 Morr. Minn. Rep. 691.

Perfection of the inchoate right initiated by prior posting of a location notice, followed by monumenting and marking boundaries, is dependent upon completion of a valid discovery in consonance with Federal and State laws. Failure to comply voids the location and renders the ground open to relocation by others.

“A failure to comply with the laws and regulations in force in the district, whether national, state or local, works a forfeiture of the claim, whether such laws or regulations so provide or not, and the same becomes subject to location by any qualified locator.”

Sisson v. Sommers, 24 Nev. 379.

(b) CONFLICT IN TESTIMONY AND TRIAL COURT'S FINDINGS.

In commenting on appellants' interest in the property, counsel refers to defendant Hulbert's demand on Cooper on June 29, 1950 for a one-half interest in the anticipated funds to be derived from the J. L. Dougan option. The fact is, of course, that long before the attempted entry of appellee's grantors Hulbert, Gregory & Rutter, preceded by Hulbert's father-in-law (Ray Ricketts), had expended time and money on the lands embraced in what are now known as the “Ray Ricketts” claims for upwards of twenty years (Tr. 276-279).

Appellee's witness, Victor E. Peterson, first appraised the Kay Cooper locations for the locators, R. C. Peterson and Carl Cooper, in July, 1949, for the immediate purpose of helping them sell “to some client” (Tr. 198), and due to his enthusiasm for the area, J. L. Dougan became interested in the area and

acquired his option from R. C. Peterson and Carl Cooper (Tr. 200-201).

Acting in the mistaken belief that his 1947 locations of the Ray Ricketts group were valid, and in ignorance of Nevada's 1941 amendment, Hulbert was willing to compromise and avoid a conflict (Tr. 304-5, 323, 238-239, 240-1).

In passing, it may be noted that appellants' grantors were the original locators of the lands in dispute under their 1947 locations, which were voided for non-compliance with the 1941 amendment.

Except for such forfeiture, appellee's relocation of the conflicting areas would not have been possible.

Appellee is in no position to complain against a strict application of the law on discovery. Except for appellants' failure to comply with the 1941 statute, appellee's grantors could not have located their Kay Cooper claims, and having taken advantage of appellants' technical omission to record certificates of location appellee should not now complain that substantial compliance is invoked against him on a similar major defect. Appellee is not the senior discoverer, although technically a senior locator. The 1947 locations of appellants' grantors were never abandoned, annual labor requirements having been performed faithfully for many successive years and forfeiture of those locations resulted only from failure of compliance with the recordation statutes (Deft's Ex. F, Tr. 268-270).

Appellants' views on the findings, as expressed in the opening brief (48-51) contain nothing to indicate,

either succinctly or inferentially, that they are predicated upon the theory that "the trial judge believed the wrong witnesses." (Ans. Br. p. 8).

In the case at bar, validation of contested mineral discoveries is not accomplished by the sufficiency of evidence, the clear weight of evidence, or a construction of the applicable law, if the third element mentioned does not coincide with either the first or second of those essential elements.

The question of credibility is of minor importance where, as here, no witness is shown to have testified falsely, all witnesses may be considered as testifying according to their lights and their opportunities for observation.

Appellants' authorities on the meaning of mineral in place are accepted by appellee.

Appellants agree that the next point in issue is not a refinement of definition of what constitutes a discovery, but whether a genuine discovery has been made. Unless it be genuine, i.e. valid in fact and law, it is no discovery.

The case of *Ambergris M. Co. v. Day* (12 Ida. 108, 85 Pac. 109) cited by appellee with quoted excerpts from the Court's opinion (Ans. Br. 11), might be somewhat in point if the Appellate Court's decision had been in favor of the senior locator as inferred by counsel.

In that case, the senior location of the "Anna" lode claims was made on August 19, 1901, and a junior location of the conflicting "Hercules" claims was made on October 4, 1901. The reviewing Court re-

versed the lower Court's judgment for the senior location and ordered a new trial (at p. 114).

Wheeler v. Holland (C.C.A. 5, 218 F. 2d 482), cited by counsel (Ans. Br. 12) is a case brought by a taxpayer against the Director of Internal Revenue to set aside tax assessments, quash distraint warrant and for similar relief, based upon alleged fraud and duress. The findings of the District Court adverse to the taxpayer's contentions were sustained by the Court of Appeals as "supported by the evidence and not clearly erroneous." However, the trial Court in that case found that the taxpayer's contentions were "unfounded in law and in fact." No such questions of law and preponderance of evidence were presented by the appellants in that case as are predominant in the case at bar.

One may opine that if decisions supporting the trial Court's findings in such unrelated cases as the *Wheeler* case were accepted as controlling in mining disputes involving questions of discovery and the like, conflicting claims to mineral lands would seldom be reviewed on appeal.

In *U. S. v. Yellow Cab Co.* (338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150), also cited by appellants (Op. Br. 50) and also by appellee (Ans. Br. 8), in recognizing the duty of the Appellate Court "to correct clear error, even in findings of fact," the Supreme Court was called upon to consider only questions of fact, and not questions of both fact and law.

The case of *Gamewell Co. v. City of Phoenix* (C. C.A. 9th, 216 F. 2d 928) cited by counsel (Ans. Br.

7, 8) is an action by the plaintiff company to recover on a contract for the installation of a fire alarm system for the defendant city. The judgment of the lower Court was affirmed in part, on questions of fact, and reversed in part on questions of law.

“The effect of findings” under Rule 52a is considered by this Honorable Court (at p. 931). After stating that the findings stand before the Court with the presumption of validity, unless they are clearly erroneous, the Court said:

“Of course, if an erroneous legal conclusion is drawn by a trier of fact, it will be set aside.”

Exceptions reserved in Rule 52(a) are so well recognized as to require no citations additional to those noted in appellants’ opening brief (50-1) and those discussed *supra*.

Where the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been committed, or where the findings are contrary to the clear weight of the evidence or where the trial Court’s conclusion has been arrived at by a wrong conclusion of law, the reviewing Court will not hesitate to rectify the error.

Appellants concede that quality or quantity of mineralization are unimportant if all essential elements for a discovery are established (Ans. Br. 10). To that limited extent the Nevada case of *Fox v. Myers* (29 Nev. 169, 86 P. 793) is in point. Having been decided in 1906, the liberal views enunciated in that case are no longer applicable, when considered in light of Nevada’s existing regulatory statutes.

Although critical of the policy of Nevada's 1941 amendment to section 4122 N.C.L. as "a severe and confusing, but unfortunately legal, prerequisite to the location of a lode mining claim" (Tr. 42) the trial Court reluctantly recognized its compulsory effect (Tr. 41), and cited with approval Mr. Justice Beatty's decision in *Gleeson v. Martin White Min. Co.* (13 Nev. 442, 459).

The basic reasoning in the *Gleeson* case, construing the beneficial effects of R.S. 2320, to the effect that where the plain terms of a statute have no room for construction, the statute must be strictly followed, applies with equal force to Nevada's amended statutes of 1907 (Secs. 4120 N.C.L. 1941 Supp. and 4121 N.C.L. 1929). As argued in our opening brief (pp. 15-16, 43-45), those regulatory laws were enacted for the same laudable purpose of curing existing ills in Nevada's former law on the subject.

All parties agree with the trial Court's holding that the mandate of the 1941 statute (sec. 4122) is expressed in plain and unambiguous terms (Tr. 41), and appellants invoke the same recognition for the mandate of sec. 4121 N.C.L. 1929, requiring that one who locates under sec. 4120 must perform sufficient discovery work to expose a lode or vein of mineral in place, and at depth.

A considerable portion of the trial Court's opinion is devoted to establishing the invalidity of all of appellants' 1947 Ray Ricketts Nos. 1 to 4 locations, and like invalidity of appellee's Kay Cooper locations

Nos. 1 to 5, because of non-compliance with sec. 4122 (Tr. 39-43).

Excepting only as to appellants' 1951 Ray Ricketts No. 3 location, which is also justly voided, the trial Court's opinion and findings are silent on the all important question of discovery as applied to the disputed Kay Cooper locations.

Aside from pro forma findings that appellee's Kay Cooper Nos. 6 to 11 were located "in full compliance with the laws of the United States and of the State of Nevada on public lands of the United States then subject to such location of mining claims" (Finding No. 5, Tr. 47), and "have each been maintained in full compliance" with said laws (Finding No. 8, Tr. 48), there is nothing in the findings to indicate that the trial Court actually found from the evidence that discovery had been accomplished on any of the Kay Cooper locations.

The trial Court also found that appellants' 1951 locations of Ray Ricketts Nos. 1 and 4 were made "in full compliance with the laws of the United States and of the State of Nevada" (Finding No. 15, Tr. 50).

As to appellants' 1947 and 1951 locations of the Ray Ricketts No. 2 claim, the trial Court expressly found that there was no valid discovery (Finding No. 16, Tr. 50-1), and the trial Court's adverse finding in that regard is assigned as error (Tr. 404, 405). As to appellants' 1947 and 1951 Ray Ricketts No. 3 attempted location, the trial Court also expressly

and correctly found that there was no discovery (Finding No. 17, Tr. 51).

In rightfully invalidating appellants' Ray Ricketts No. 3 location, the trial Court quoted at length from the damaging testimony frankly presented by the locator Hulbert in admitting, on direct examination, that even after supplementing his initial efforts with a bull dozer he never struck a lode, "only sand." (Tr. 44).

Measured by the same standards for the exposure of a qualifying lode or vein in place, and even if the testimony of appellee's witnesses were accepted at face value, none of the conflicting Kay Cooper locations meet the requirements of either R.S. 2320 or Sec. 4121 N.C.L. 1929. On the other hand, appellants' supporting evidence of valid discoveries on Ray Ricketts Nos. 1, 2 and 4 stands uncontradicted in the record.

CONCLUSION.

For the reasons presented, appellants urge that the judgment appealed from be reversed.

Dated, Reno, Nevada,
April 18, 1955.

Respectfully submitted,

WALTER ROWSON,

*Of Counsel for Defendants
(Appellants).*

No. 14,553

United States Court of Appeals
For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPO-
RATION, V. E. WILLEY, G. F. STURDE-
VANT, C. FITCH, L. A. PRISK, BILL
GREGORY, D. HULBERT and GEORGE N.
TAUSAN,

Appellants,

VS.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

APPELLANTS' PETITION FOR A REHEARING.

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vs.

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Appellee.

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellants in the above-entitled cause present this,
their petition for a rehearing in said cause, and in
support thereof respectfully show:

(I)

Appellants respectfully invite the attention of this
Honorable Court to an apparent oversight in the
Court's assumption that invalidity of the contested

Kay Cooper locations is predicated solely upon failure of discovery as required by the Federal Statute 30 USCA, Sec. 23. In their opening and reply briefs appellants have recurrently stressed the necessity for proving the discovery of a vein or lode disclosing a deposit of mineral in place as required by the Nevada statute, Sec. 4121, Nevada Compiled Laws, 1929. (Op. Br. pp. 13, 14, 15-16, 32, 37, 47-48; Reply Br. pp. 12, 18, 20.)

It is quite true that in presenting his case on trial, and also in his Answering Brief, appellee chose to ignore Nevada's statutory requirements for discovery, albeit positive evidence of compliance with controlling State law on the subject is essential to the validation of each of the disputed locations. Section 4121 N.C.L. was enacted in consonance with the delegated power conferred by Congress for supplementation of the Federal law relative to the location of mining claims on the public domain.

The Federal statute neither defines discovery nor requires recordation of a notice or certificate of location, as distinguished from the mandatory requirements of Nevada law. The delegated power was first exercised under rules and regulations instituted by miners in their several mining districts, and later by adoption of appropriate legislation in the sovereign States, as best suited their surrounding conditions and circumstances. (Op. Br. pp. 14, 37-46; Reply Br. pp. 11-13.)

Although the recordation of a Notice of Location or a certificate of location is not required by Federal

law, the Supreme Court sustained as mandatory the Montana statute requiring such recordation in that State. *Butte City Water Co. v. Baker*, 196 U.S. 119, 49 L.ed. 409.) What shall constitute a valid discovery under the mining laws, both Federal and State, is certainly equally as important to the validation of a mining claim as the recordation of a notice or certificate of location.

In so ignoring the State law, appellee coincided with the erroneous conception of Nevada statutory requirements for a mineral discovery adopted by the Trial Court in its Opinion, Findings and Conclusions, which contain nothing on the paramount question of discovery on the disputed claims.

Under Federal law, the posting and monumenting of a mining claim, unless accompanied by diligent efforts toward a discovery, confer no title or exclusive right of possession in the locator, nor under Nevada law, unless compliance is had with the requirements of Secs. 4121 and 4122, N.C.L. 1929 within the time prescribed by those sections; and in any event before peaceable entry and perfection of a discovery by a subsequent locator of the same area. (*New England Coalinga Oil Co v. Congdon*, 92 P. 180, 152 Cal. 211, 213; *Thallman v. Thomas*, 111 F. 277, 279, 49 C.C.A. 317, and other cases cited in Op. Br. pp. 42-3.)

The Federal statute (R.S. 2320, 30 USCA, Sec. 23) requires only the discovery of a vein or lode of mineral-bearing rock in place, with no minimum requirements for exploration or exposure of the vein or lode at depth. On the other hand, Nevada law prescribes

what shall be done by a locator in order to factually establish the discovery of a vein or lode in place, by the performance of exploratory work on the vein or lode to a designated minimum depth beneath the surface. The actual discovery required by Nevada law is distinguished from mere surface indications which may, and frequently do, disappear with the first strokes of a pick and shovel. (Op. Br. pp. 15-16.)

The record convincingly shows that appellee failed to perform anything more than token location work on the Kay Cooper Nos. 6, 8, 9 and 10, consisting of 240 cubic feet of excavation, which appellee's witnesses frequently described as "pits" or "trenches."

In complete disregard of Nevada's mandatory requirement, appellee's attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 are supported by nothing more by way of discovery than the excavation of 240 cubic feet on the surface. In no single instance was such surface excavation prosecuted to the requisite minimum depth of 10 feet, or upon the surface outcrop of an exposed vein or lode of mineral-bearing rock in place.

The certificates of location describe the so-called discovery work as: on the Kay Cooper No. 6, "an open cut" 6 feet wide, 8 feet long and 5 feet deep; on the Kay Cooper No. 8, "an open cut" 6 feet wide, 13 feet long and 3 feet 6 inches deep; on the Kay Cooper No. 9, "a pit", 6 feet wide, 14 feet long and 3.5 deep; and on the Kay Cooper No. 10, a "pit" 5.5 feet wide, 14 feet long and 3.25 feet deep; and in each instance recite the exposure of a ledge, lode or vein in place, but with no mention of mineralization.

The excavation of a pit or trench as location work is not recognized in Section 4121, N.C.L. as an acceptable alternative to the sinking of a shaft at least 10 feet deep, the authorized alternatives being a cut, or cross cut, or tunnel which cuts the lode at a depth of 10 feet, or an open cut along the ledge or lode, equivalent in size to a cut 4 feet by 6 feet by 10 feet deep.

Existing doubts as to the verity and actuality of a discovery on each of the Kay Cooper claims might have been resolved had appellee seen fit to produce in Court the drill cores, core assays and drilling logs essential to the type of testimony furnished by the driller (Joe Federhoff), whose activities extended from the middle of February to the end of March, 1950. (Tr. 76-80.) In the absence of that material data, generalized testimony of the driller is of no probative value; and coupled with J. L. Dougan's relinquishment of his option on June 30, 1950 raises the reasonable inference that there was no sufficient showing to warrant a reasonably prudent man in expending further time and effort on the property.

The record also shows that after acquiring an option on the property from the purported locators, and during the period from September 8, 1949 to April 1, 1950 appellee's grantor, J. L. Dougan, expended upwards of \$10,000.00 in surface trenching and diamond drilling on the Kay Cooper group, under the supervision of Lee Dougan, a qualified geologist and engineer, "to determine the probable value in tungsten", in addition to the further sum of \$10,000.00 paid to the locators on their option purchase price. (Tr. 81-3, 85, 88.) Appellee's witness, Joe Federhoff

testified that he drilled approximately 700 or 800 feet, but there was no evidence indicating on what particular claim or claims such drilling was performed.

J. L. Dougan relinquished his option on the Kay Cooper group on June 30, 1950 (Tr. 73), and the record is barren of evidence that exploratory work was performed by appellee or his grantors on any of the disputed Kay Cooper locations subsequent to such relinquishment.

(II)

The evidence presented by appellee on the question of discovery does not support the pro forma recitals of discovery contained in the recorded certificates of location required by Sec. 4122, N.C.L. Supp. 1941.

Where recitals in a certificate of location are traversed by competent opposing testimony their force and effect as prima facie evidence under the cited section of Nevada law is ineffectual unless corroborated^{OR} by a preponderance of supporting evidence, as distinguished from such bare recitals.

“Recitals of discovery in the recorded notices of location of lode mining claims are mere ex parte selfserving declarations on the part of the locators and are not evidence of discovery.”

(*Cole v. Ralph*, 249 F. 81; 252 U.S. 286, 64 L.ed. 567, at p. 580; citing: *Creede and C. Creek M. Co v. Uinta Tunnel M. & Transp. Co.*, 196 U.S. 337, 353, 49 L.ed. 501-509, 25 S. Ct. 266; 1 Lindley 3rd Ed., Sec. 392 and other cases.)

The cited case was tried before a jury in the Nevada Federal Court, and judgment entered for plaintiff on the jury's finding that defendants had made no discovery of a lode location. On appeal to the Ninth Circuit Court, the judgment was reversed, and on certiorari the Supreme Court reversed the judgment of the appellate court and affirmed the judgment of the trial court. In discussing the evidence on the question of discovery in that case, Mr. Justice Van Devanter said:

“The evidence bearing upon the presence or absence of lode discoveries was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendants contended the other way. Separately considered, some portions of the latter were persuasive, but it was not without noticeable infirmities, among them the following: the defendant testified that no ore was ever mined upon any of the lode claims, and that ‘there was no mineral exposed to the best of my knowledge which would stand the cost of mining, transportation and reduction at a commercial profit.’ In the circumstances this tended to discredit the asserted discoveries; and a like tendency was his unexplained statement, referring to the claims grouped in this patent application, that ‘some of them haven’t a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims’—an obviously mistaken view of the law—and his further statement, referring to vein material particularly relied upon as a discovery, that he ‘would hate to try to mine it and ship it.’ ”

The ex parte quality of selfserving recitals in notices or certificates of location is recognized and applied in Nevada. (*Fox v. Meyers*, 29 Nev. 169, 186; 86 Pac. 793; *Round Mtn. M. Co. v. Round Mtn. Sphinx M. Co.*, 36 Nev. 543, 560; 186 Pac. 71.)

“A certificate of location is not evidence of the fact of a discovery, and such certificate setting forth the date of location is not evidence of a discovery either upon that or any other date.”

(*Round Mtn. M. Co. v. Round Mtn. Sphinx M. Co.*, supra.)

“It is well settled that the basis of location is discovery and that the mere posting of a notice without a discovery is of no force or effect so far as rendering invalid another location covering a portion of the same ground based upon a valid discovery.”

(Idem, at p. 560—citing: *Patchen v. Keeley*, 19 Nev. 404; *Gibson v. Hjul*, 32 Nev. 36; *Overman v. Corcoran*, 15 Nev. 147; *Fox v. Meyers*, 29 Nev. 169; *Nash v. McNamara*, 30 Nev. 114; *Creede Mining Co. v. Tunnel Co.*, 196 U.S. 337; *Uinta Co. v. Creede Co.*, supra; *Nevada Oil Co. v. Home Co.*, 98 Fed. 678; *Tuolumne Co. v. Moier*, 134 Cal. 583; *Weede v. Snook*, 144 Cal. 439.)

Location can rest only on actual discovery, and without discovery no rights can be acquired save the right to maintain *pedis possessio* while diligently seeking to make discovery. The recitals in a location

notice or certificate, or mere possession without diligent efforts toward discovery create no presumption of discovery.

(III)

The Nevada case of *Cole v. Ralph* (supra), in its evaluation of conflicting evidence on the question of discovery, is also exceptionally illuminating when considered in relation to appellant's well justified stand on that question as applied to the case at bar.

As viewed by the Supreme Court in the cited *Nevada* case, persuasive evidence of discovery was not sufficiently convincing to validate the challenged lode locations. The holding in that case is particularly significant, both as to the absence of positive evidence of an actual mineral discovery on any of the disputed Kay Cooper locations, and to appellee's implied theory that evidence of discovery anywhere in the located area may be applied at will to any contiguous claim in the group. That untenable theory is clearly indicated by appellee's acceptance of the indefinite testimony furnished by his witnesses in response to generalized questions directed to the group as a whole, and not specifically to each individual location. (Op. Br. pp. 20-22, 24, 29; Reply Br. pp. 3-7.)

The record discloses no positive evidence of discovery on Kay Cooper Nos. 9 and 10, and we must respectfully urge that where the evidence presented "is not particularly satisfying" and "unclear as to

whether or not the ore was in place," as noted in the Opinion of this Honorable Court, the invalidity of those claims is no longer open to question.

In the absence of evidence that the tungsten ore, allegedly found in the cuts or discovery holes by appellee's mining witnesses, was in place within the commonly accepted meaning of the words "in place," it was not necessary for appellants to establish that such tungsten ore was merely float.

Appellee had the burden of proving a discovery of ore or mineralized rock in place on each of the disputed locations prior to appellant's completed discovery on each of the Ray Ricketts locations, and failed to meet that burden. Carl H. Cooper, a co-locator of all of the Kay Cooper claims, described the location work on Kay Cooper "Nos. 6 to 11" as: "The same as the past, open cut, 240 cubic feet or more each and every one of them." (Tr. 128-9.) The witness stated that he found ore in the location cuts, but did not state, and was not asked, whether the ore was in place.

Testimony of the co-locator, R. C. Peterson, was to the same effect, discovery work being described as "a hole in the ground * * * measured over 240 cubic feet of ground moved." (Tr. 182); "open cuts and such as that." (Tr. 185.) This witness testified that he found mineral in Kay Cooper Nos. 1 to 5 (which are not in dispute), but did not testify, and was not questioned, as to mineralization in Kay Cooper Nos. 6, 8, 9 and 10. (Tr. 184-5.)

The remaining lay witness for appellee (Albert Brown) furnished no evidence on Kay Cooper Nos. 6, 8, 9 and 10. (Tr. 218-253.)

Neither of appellee's expert witnesses (Victor E. Peterson and Lee V. Dougan) called by appellee in support of the claimed discoveries, was sufficiently familiar with the Kay Cooper locations to be able to testify, and was not questioned, as to the existence of a vein or lode required by Federal law, or as to the existence of a lode deposit of mineral in place required by Nevada law. (Op. Br., p. 27; Reply Br. p. 7; Tr. p. 212.)

All that can be reasonably deduced from the testimony of the witness, Victor E. Peterson, is that on Kay Cooper No. 8, "there is a definite showing on the rock on the surface" and that on Kay Cooper No. 6 tungsten "is very definitely in place." (Op. Br. p. 27; Tr. 211-213.)

A showing on the rock on the surface, in the absence of further elucidation as to the extent of such showing, and whether the rock was contained in a vein or lode in place, is wholly inadequate to establish a valid discovery on Kay Cooper No. 8. Considered at its face value, and disregarding appellants' evidence to the contrary, the mineral showing on Kay Cooper No. 6 would suffice to meet the Federal requirements for discovery if the witness had also testified that the mineral in place was contained in a lode or vein, (Reply Br. pp. 7-9), supported by other evidence on the record that sufficient exploratory work had been

performed thereon to meet the requirements of Nevada law.

(IV)

The only testimony that the parties are claiming the same vein or lode was furnished by appellee's closing witness in rebuttal, Lee V. Dougan, who testified regarding seven trenches dug on one or more Kay Cooper locations. (Tr. 396-8, Pltff's Ex. 17.)

Excepting as to the Kay Cooper No. 2 location, which is not in dispute, it cannot be definitely determined from Mr. Dougan's testimony on what particular location the trenches were dug. (Tr. 396.) With no previous mention of Kay Cooper No. 8 the witness was asked:

“Now in these trenches that you have testified to on Kay Cooper No. 8 and Kay Cooper No. 2, did you find ore in place?”

The witness answered affirmatively, over appellants' objection, (Tr. 397), then testified that he found veins on both Kay Cooper No. 2 and Kay Cooper No. 8, that “they had just a little showing,” and that they were the same veins as exposed in the workings of Nevada-Pacific Development Corporation. (Tr. 398-9.)

There was no testimony by the witness of any trenching or vein exposures on Kay Cooper Nos. 6, 9 or 10.

Questioned by appellants, the witness further stated that he is not familiar with the discovery work on any of the Kay Cooper locations. (Tr. 400-1.)

On this state of the record, appellee's identification of a vein or lode solely upon the Kay Cooper No. 8 raises no presumption, in the absence of other evidence, that a similar condition exists on Kay Cooper Nos. 6, 9 and 10.

As to Kay Cooper No. 8 the question still to be determined is: which of the contending parties was first in time in perfecting an authentic discovery? That question is clearly answered on the record.

Appellee's exploratory trenching, which supplemented the token efforts of the locators but still lacked compliance with Nevada's requirements for discovery, was performed during the period of J. L. Dougan's option, from September 8, 1949 to the latter part of June, 1950. (Tr. 395.) As mentioned above, the Dougan option was relinquished on June 30, 1950, and thereafter appellee performed no further work on any of the disputed locations prior to appellants' location of Ray Ricketts Nos. 1, 2 and 4 on February 8, 1951, and the completion of discovery on each of those claims by April 6, 1951 in full compliance with Federal and State laws.

It is axiomatic that priority of discovery gives priority of right against naked location. (Op. Br. pp. 42-3.)

(V)

Appellants respectfully suggest that affirmation of the Trial Court's findings and decree requires that they be supported by sufficiency of the evidence, and not merely supported by evidence. (Op. Br. 48-9.)

(VI)

For the reasons above stated, appellants' request that a rehearing be granted and that upon such rehearing the judgment of this Honorable Court be reversed.

Dated, November 7, 1955.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Nevada-Pacific Development Corporation et al. by their attorneys, hereby certify that the within and foregoing Petition For Rehearing is not presented for the purpose of delay, and in the opinion and judgment of counsel, is well founded in law and properly filed herein.

Dated, November 7, 1955.

WALTER ROWSON,

*Of Counsel for Appellants
and Petitioners.*

